MARCH 1960 • Volume 46 • Number 3

American Bar Association JOURNAL

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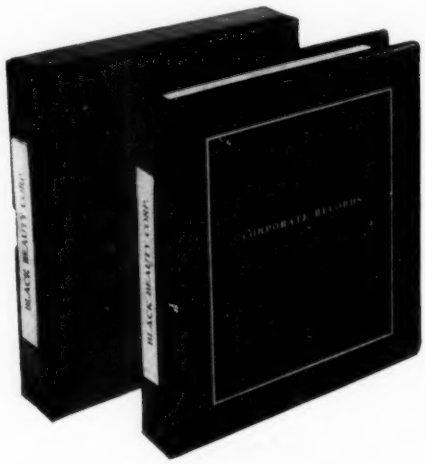

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March, 1960

VOLUME 46
No. 3

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American Bar Association JOURNAL

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1155 East 60th Street, Chicago 37, Illinois.

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Good Telephone Service and Good Telephone Earnings Go Hand in Hand

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The function of the Bell System is to serve you and serve you well.

It works two ways.

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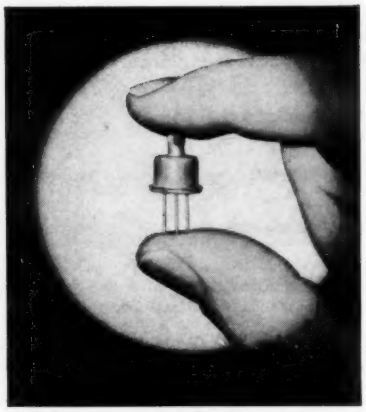
Sheer prudence would bring a hesitancy to go full steam ahead if there are too many restrictions on profits. Or if the rewards of efficiency, good research, good management and downright hard work are sliced away as soon as earned.

In the telephone business there is special need for a sustained level of adequate profits. For the telephone business, more than almost any other, is a long-term business. Always we must keep building ahead to meet the needs of tomorrow.



NEW AND BETTER SERVICES for telephone users will come from the Bell Telephone Laboratories invention of the Transistor, a major scientific breakthrough. This mighty mite of electronics, which can amplify electric signals up to 100,000 times, will play a big part in push-button telephony, for example. The Transistor has been made possible by basic physical research that can only be undertaken by a progressive business with good earnings over the long pull.

These needs are growing every day. Just the gain in population alone gives some idea of their size.

By 1970—just ten years away—there will be 40,000,000 more people in the United States. More and more communication services will be required by people, industry and defense.

So when we emphasize the need for satisfactory earnings on a continuing basis, it is for a very practical and useful purpose. It helps us, of course. But in a very real sense it helps you.

Only with adequate profits can we run the business most efficiently and take advantage of long-range economies.

Only with adequate profits can we finance and put in operation the latest advances in telephone science.

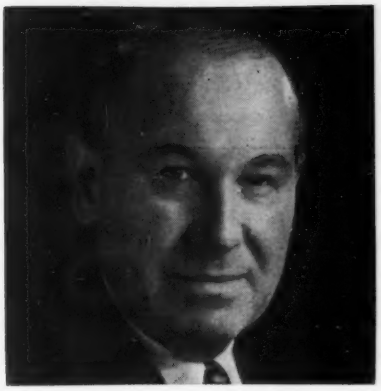
All this not only improves the service but helps to hold down the cost of providing it.

The result over the long run is bound to be better service for you at a lower price than you would otherwise have to pay.

BELL TELEPHONE SYSTEM

The President's Page

John D. Randall



Last month a letter went out from me to every member of the Association. It concerned American Bar membership, and the effort we are making to extend to every non-member lawyer in the country a cordial invitation to join the Association. The emphasis of the letter was on every lawyer's responsibility to support the national association of his profession. An application form was enclosed and each member was asked to place this in the hands of a non-member lawyer friend.

The early responses to the letter have been immensely encouraging to me, so much so that I want to share some of the typical replies with you. Two important trends of thought stand out in them: (1) Lawyers are coming to realize, more than ever before, that a strong national association is essential to the future of the profession, and (2) The only way the American Bar Association can do more things for the benefit of lawyers is to broaden its membership and thus build up its influence and resources.

Some of the most interesting comments came from non-members who decided to join the American Bar Association and took time to tell me why.

A lawyer in Athens, Ohio, for example, had this to say: "A study of the economic status of the practicing lawyer is not encouraging. But it is encouraging that the American Bar Association has taken cognizance of the many problems confronting the profession and is acting on them. I have not always been in accord with the direction and leadership of the Association and therefore had never reached a decision to join. In this I now believe that I have been in error..."

From Pine Bluff, Arkansas: "I fear we are losing sight of our obligation. To many of us, the shoe has been on the wrong foot—what can the Association do for me? I think we owe the organization more than I, at least, have been giving. I agree with what you say ... and enclose my application."

Here are some sample comments from members of the Association:

From Lubbock, Texas: "Please send me 150 copies of the leafiet *200,000 Heads Are Better Than One* and a like number of membership applications... I will be glad to make this appeal for ABA membership through our local bar."

A lawyer in Denver wrote: "I share your strong feeling that all lawyers should belong to the ABA if the Association is to have the strength and power we want it to have..."

Another in Newark put it in stronger terms: "I shall be delighted to help... in the past there has been too little effort made to promote the membership of the Bar Association. Any lawyer worth his salt should be a member."

By coincidence, two letters from Washington, D. C.—one from a practicing lawyer and one from a sitting judge—struck an analogous note. The lawyer wrote: "It is inconceivable to me that an attorney would not feel that membership in the American Bar Association was absolutely essential to him." The judge observed: "Obviously it would not be appropriate for me as a judge to invite members of the Bar who might practice before me to join the Association because they might feel under some obligation. I can, however, invite some of my fellow judges and this I am going to do. I think every member of the Bench should belong to the American Bar Association."

And a member from my home state of Iowa made this interesting observation: "I'm sure a lot of clients would be shocked if they found out that their attorney was not a member of the American Bar Association. And the lawyer would be embarrassed to have them find out. To the public, American Bar Association membership means professional standing and responsibility..."

Apart from what the writers said, the significant thing about the mail was that so many lawyers were taking the time and trouble to write and to promise help.

We are on the brink of a milestone in American Bar Association development. As of January 31, the Association membership stood at 95,290. We are clearly in a favorable position to top the 100,000-member mark. This can be achieved very readily if enough Association members will take a very few minutes of time to call on a friend who doesn't belong and ask him to join. Among the more than 200,000 practicing lawyers in the country are many who never have been invited to join.

Why are we asking your help? In a growing profession, and a rapidly changing profession, the American Bar Association cannot stand still. To do so would in reality be to slip backward. We must move forward on a dozen fronts to steadily improve our services for lawyers—in public relations, unauthorized practice, continuing education, protection of professional standards, to name just a few. Without the help of the membership, we can't possibly reach all of the good potential members. If you haven't yet sent that membership application to a non-member friend, it isn't too late. Please do it now.

Views of Our Readers

■ **Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.**

Anyway, We Knew It Wasn't the University of Washington

Impressed as I was with Mr. Burns' article in your January issue "The True Identity of Tennessee Williams", I feel constrained to point to a chink in the armor of Mr. Burns' research. There is no educational institution in Missouri bearing the name "George Washington University". The correct name of the St. Louis institution is "Washington (no George) University".

"George Washington University", or, more properly, "*The* George Washington University" will be found by any who are curious in Washington, D. C., some five or six blocks' distance from the White House.

Aside from this trivial oversight, I find the evidence overwhelming that Tennessee Williams neither wrote "The Plays" nor ever in fact existed.

JAMES C. MAUPIN

Los Angeles, California

Tennessee Williams' Piece the Work of a Wrong Boxer?

"Another Mystery Solved: The True Identity of 'Tennessee Williams' " is one of the funniest pieces I have ever read—comparable to the best of the Sherlockian theses, I suspect Mr. Burns is himself not only a Sherlockian but possibly a Wrong Boxer as well.

ETHA B. FOX

Chicago, Illinois

Genius Must Be Taken Seriously

Realizing, of course, that I may be treading on the scholarship of the article by Mr. Burns, I would, nevertheless, appreciate it if you would allow me to bring something to Mr. Burns' attention.

Mr. Burns should most certainly realize that genius is the one flower of civilization, in both literature and history, that sets one apart from his contemporaries. Surely he would admit the existence of such a phenomenon as "genius". If then, this be admitted, why should one wish to allude to another's humble beginnings to discredit any great intellect which may subsequently burst through upon the stage of humanity? The thing that is particularly vexing to me is the "reasoning" that one must come from noble stock to be noble. For example, let us take the life of one whose every footstep was followed as He wandered along the shores of the Sea of Galilee. Surely none could have had a more humble beginning, for He was the son of a lowly carpenter, yet in the brief span of thirty-three years He was to leave emblazoned on the pages of history a philosophy and teaching that will never die. Perhaps, Mr. Burns, Jesus was in reality someone else?

Therefore, I submit that although Shakespeare and Williams came from humble stock, "their" achievements should not be summarily dismissed. We would be much happier if we did not try to discredit genius—if we did not attempt to cloud their names with just a scintilla of evidence. I submit that we should recognize genius for what it is, wherever it may be found. Otherwise, as Shakespeare said: "It is a tale told by an idiot, full of sound and fury, signifying nothing".

WILLIAM L. GULLEY

Culpeper, Virginia

He's for Professor Garwood

Professor Garwood's article on how the budget grows (September, 1959) was delightful and a credit to him, especially since he is a professor of economics. Through never-ending budget growth, too many economists aspire to become state capitalists running industry from Washington.

I know from personal experience of featherbedding, inefficiency and paper empire-building in government, from the lowest to the highest levels. I know of one case, where twenty people worked for two years at a job that could have been done by only two persons, where much of the time was spent in writing job descriptions, proposing organizations and reorganizations and obtaining promotions based on misrepresentations.

I am sure that Vaux Owen of the National Federation of Federal Employees is aware of many other examples. Yet, in the December, 1959, issue he takes heavy-handed exception to Professor Garwood's really light-handed essay.

The fact is that the problem of public expenditures including military expenditures is serious because it does grow. It grows and grows because obsolete and completed programs are not phased out to accommodate new requirements. Thus we have a consequent process of persistent additions without any offsetting subtractions. This situation stems largely from the perverse motivation to increase costs on the part of our civil servants. This motivation exists unfortunately also in our elected political servants. They cannot reduce the number of jobs in government because our economic and political situation has made such attempts unpopular. . .

ARTHUR SHARRON

Department of Economics
Duquesne University
Pittsburgh, Pennsylvania

(Continued on page 238)

published monthly

American Bar Association Journal

the official organ of the American Bar Association

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect so far as possible, the objectives of the organized Bar of the United States.

There are eighteen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Family Law; Insurance, Negligence and Compensation Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral and Natural Resources Law; Municipal Law; Patent, Trademark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who has been duly admitted to the Bar of any state or territory of the United States and is of good moral character is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except that for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the Junior Bar Conference or the Section of Legal Education and Admissions to the Bar. Dues for the other Sections are as follows: Administrative Law, $5.00; Antitrust Law, $5.00; Bar Activities, $2.00; Corporation, Banking and Business Law, $5.00; Criminal Law, $2.00; Family Law, $5.00; Insurance, Negligence and Compensation Law, $5.00; International and Comparative Law, $5.00; Judicial Administration, $3.00; Labor Relations Law, $6.00; Mineral and Natural Resources Law, $7.00; Municipal Law, $5.00; Patent, Trademark and Copyright Law, $5.00; Public Utility Law, $5.00; Real Property, Probate and Trust Law, $5.00; Taxation, $8.00.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East 60th Street, Chicago 37, Illinois. An application for membership should be accompanied by a check for dues in the appropriate amount as follows: $16.00 for lawyers first admitted to the Bar in 1954 or before; $8.00 for lawyers admitted in 1955, 1956 and 1957; and $4.00 for lawyers admitted in 1958 or later.

Manuscripts for the Journal

The JOURNAL is glad to receive from its readers any manuscript, material or suggestions of items for publication. With our limited space, we can publish only a few of those submitted, but every article we receive is considered carefully by members of the Board of Editors. Articles in excess of 3000 words, including footnotes, cannot ordinarily be published.

Manuscripts submitted must be typewritten originals (not carbon copies) and must be double or triple spaced, including footnotes and any quoted matter. The Board of Editors will be forced to return unread any manuscript that does not meet these requirements.

Manuscripts are submitted at the sender's risk and the Board assumes no responsibility for the return of material. Material accepted for publication becomes the property of the American Bar Association. No compensation is made for articles published and no article will be considered which has been accepted or published by any other publication.

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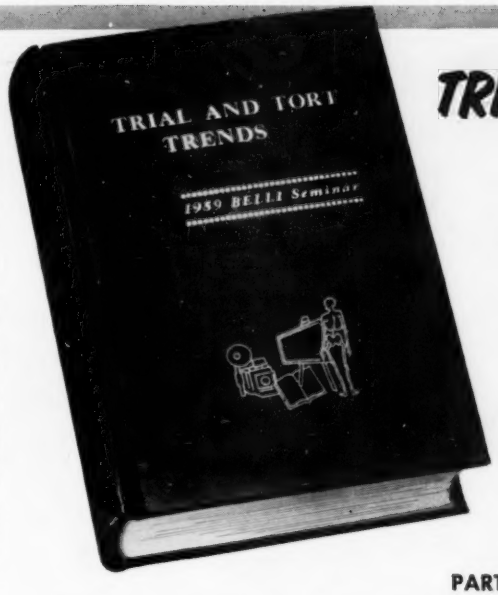

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Editor: LOUIS R. FRUMER

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by DAVID W. LOUISELL, Professor of Law, University of California, Berkeley, and HAROLD WILLIAMS, M.D., LL.B.

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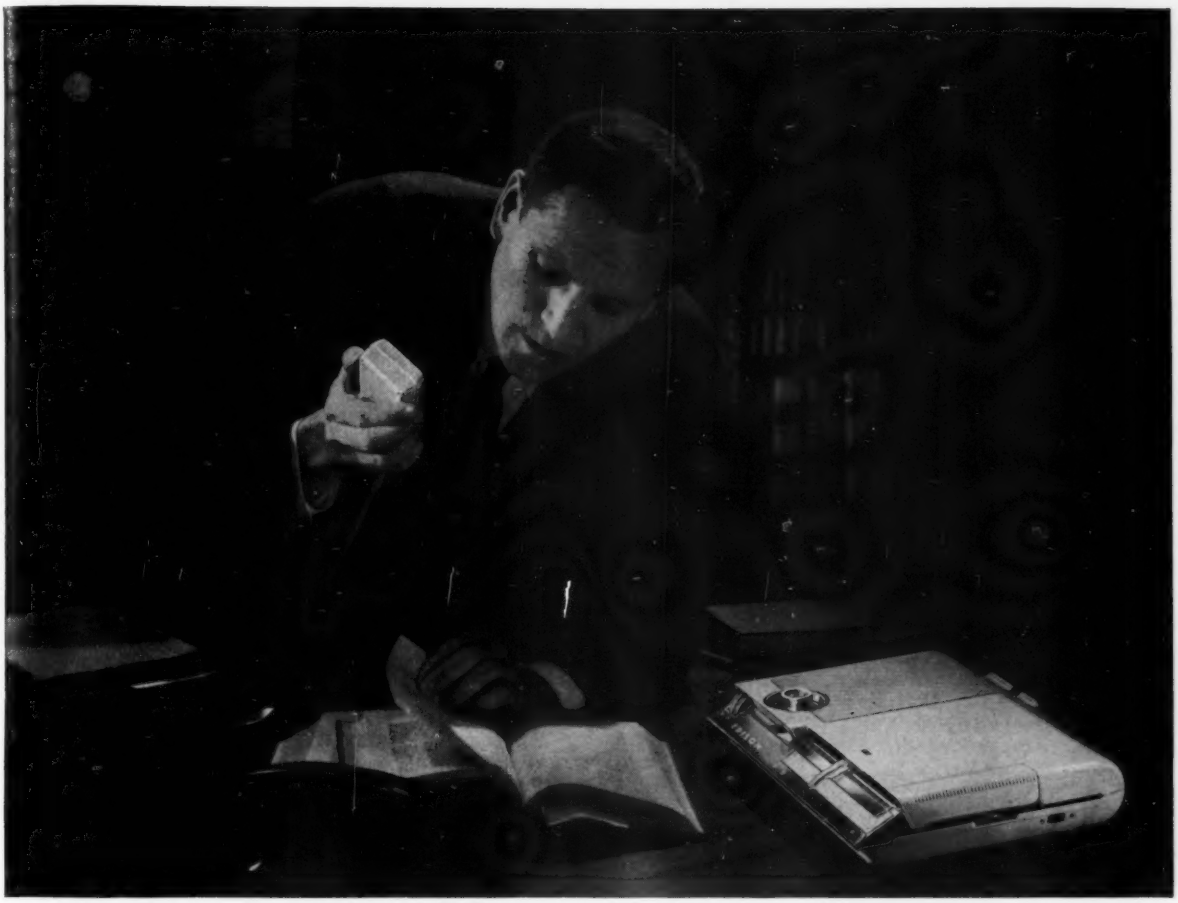

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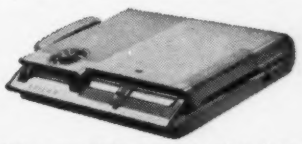

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(Continued from page 230)

Lawyers at Courts Martial

I enjoyed the article entitled "The Lawyer in the Military: Enlisted Men as Counsel at Courts Martial" written by David J. Condon which appeared in the January, 1960, issue of the JOURNAL.

I agree with many of Mr. Condon's views; however, I feel compelled to call attention to the following error. Mr. Condon states:

> The accused has a right to counsel before the three-member special court, but no right to have a lawyer as counsel unless counsel for the Government is a lawyer.

I feel sure that he meant that to be:

> The accused has a right to counsel before the three-member special court, but no right to have a lawyer as counsel *appointed by the convening authority without cost to the accused* unless counsel for the Government is a lawyer.

Article 38 (b) of the Uniform Code of Military Justice spells out very clearly that an accused has the right to be represented before a general or special court-martial by civilian counsel if provided by him. If, however, he does not exercise this right, he does not then have a right, in a special court-martial, to have a military lawyer appointed to defend him unless counsel for the Government is a lawyer.

HAROLD J. BROUILLETTE
Marksville, Louisiana

In Defense of Military Lawyers

Mr. Jon R. Waltz's article, "Court of Military Appeals: An Experiment in Judicial Revolution", in the November issue of the JOURNAL presents an interesting commentary on the United States Court of Military Appeals; however, it grossly misrepresents the stature and abilities of the modern military lawyer. Specifically on three occasions military lawyers were more or less described as a small band of inexperienced and shaky amateurs

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junior grade. Nothing could be further from the truth.

I have served several years as a military law instructor in the Judge Advocate General's Reserve Training Program, and consequently have been privileged to meet hundreds of military lawyers from all parts of the United States, and these lawyers are not inexperienced amateurs in any sense. The majority of our civilian lawyers have little or no knowledge of the functions of the Judge Advocate General's Corps of the United States Army, and consequently the conclusions and opinions they may form from the implications and statements of an apparently disgruntled ex-JAG officer could reflect unfavorably on the Corps as the same are grossly misleading and incorrect. . .

DAVID R. BAUM

Delphi, Indiana

The Other Side of Capital Punishment

Regarding Mr. Henry's tear-jerking plea (January, 1960, issue, page 52) against capital punishment, I wonder if he could depict the following incidents in a future article, with the same vivid clarity and color:

1. The pain and suffering of being kicked, beaten, stabbed, poisoned, or shot to death.

2. The anguish of parents after their daughter's brutal rape.

3. The cries of despair of helpless little children, innocent victims of an arsonist.

The list could go on and on. A society cannot long survive without protecting itself from depravity. If such protection entails capital punishment, it is a just means to an end. Our society has no need for those persons who cannot conform to the basic commands of God and civilization.

DONALD E. ROHALL

Washington, D. C.

A Disturbing Tax Case

In Tax Notes in the November, 1959, issue, an article by Arthur L. Nims III, on deferred compensation, cites *Frank Cowden, Sr.*, 32 T.C. No. 73, and states

that the taxpayer-lessor "was entitled to receive" a certain sum on execution of a mineral lease, but insisted, for tax purposes, that this sum be paid over a three-year period.

A careful reading of the *Cowden* case shows that in law and in fact the taxpayer was never "entitled to receive" this money other than over the three-year period. The lessee, Stanolind Oil Co., had *offered* an arrangement calling for immediate lump sum payment in full, but the taxpayer had rejected that offer, insisting instead on an agreement calling for payments over the three-year period. He prevailed, and this agreement was the only one ever entered into.

This is the very crux of the case. Take away this factor and the majority opinion represents a run-of-the-mill application of the constructive receipt doctrine. The disturbing fact in this case is that the taxpayer never had the right to the immediate receipt of the full amount of that bonus or oil-royalty. He was offered a contract which would have entitled him to such a receipt but rejected the offer, as Judge Forrester points out in his dissenting opinion.

Nor can the result be dismissed by reference to the doctrine of "cash equivalent". The majority opinion does not purport to overrule earlier cases denying cash equivalence to mere contractual rights held by cash basis taxpayers, and uses the language of constructive receipt repeatedly.

I agree with Mr. Nims when he describes the result as disturbing, but I am disturbed largely because the taxpayer there was *not* entitled to receive that on the basis of which he was taxed.

SEYMOUR I. SHERMAN
Tax Court of the United States
Washington, D. C.

Insurance Rates for Charitable Institutions

In your August, 1959, issue you carried an article entitled "Charitable Immunity: Why Abandon the Doctrine of Stare Decisis?" by Sister Ann Joachim, O.P. At page 827 of that issue, Sister Ann, defending charitable immunity, asks if it would not be true that the abandonment of that doctrine would raise the insurance rates for eleemosynary institutions. Her question is logically unfair, since it is the duty of a proponent of an unusual rule of law to submit his own factual support and not to make rhetorical inquiries to make up for the lack of such facts.

However, I have applied myself to the very simple task of finding out what the rates are for charitable institutions in the states whose cases Sister Ann discusses in her article. I find that the insurance rates in question vary widely in those states, depending on locale, and that the difference between the rates in states without immunity and in those with immunity shows no increase which can be traced to immunity or the lack of it.

JOHN J. BRACKEN
Newark, New Jersey

Attorney's Fees in Unmeritorious Litigation

Your editorial "A Judicial Experiment" contained in the January, 1960, issue, dealing with delay in trial of cases, prompts me to suggest that you have some competent attorney or law school dean write an article dealing with the English method of assessing costs, including attorney fees, against the losing party in litigation. Perhaps the English have discovered that this arrangement tends to discourage unmeritorious litigation, thus relieving the courts from having to try such cases. Also, there seems to be merit in compelling the losing party to pay for the expense which he has placed upon the shoulders of the prevailing party.

Of course all the states, and the Federal Government in some cases, have laws which permit assessment of costs (including attorney fees fixed by court) against the losing party; but in most jurisdictions, the right to fix attorney fees as costs is very limited.

Cost bonds could also be required, as a further damper on the commencement of unmeritorious litigation by persons who seek relief to which they are not entitled. Unmeritorious appeals could also be penalized by assessment of costs (including reasonable attorney fees) against the losing party. It is much too easy to file action on a bad

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cause of action and seek a compromise settlement, then retire from the fray by dismissal of the action after causing the other side to expend substantial sums of money in defense of its side of the case.

ROBERT L. FAUCETT

Los Angeles, California

Wash Jones Argument Surprises Him

Within the limited time available to working lawyers, I try to digest the periodic publications of the JOURNAL. Frequently I find occasion mildly to disagree with the expressions of authors who avail themselves of your forum. I have just read the closing argument of Mr. Joe W. Henry, Jr., in the case of *Tennessee* v. *Wash Jones* appearing in your January issue. The closing argument as reported, is an outstanding example of the use of rhetoric not lightly to be deplored in the forensic field.

However, I am somewhat surprised to find this verbatim attack upon the established law of the State of Tennessee given space in our publication. In my judgment, the argument to which the JOURNAL has given substantial space, is one properly to be presented to the Legislature of the State of Tennessee. Such rhetorical appeals to laymen sitting as jurors can have no other or different effect than to encourage violations of the law and to produce verdicts further encouraging the same. I cannot but wonder whether or not the prosecutor was in the courtroom during the period of this argument and if so, why the same was not stopped by proper objection. I am also somewhat concerned to know what instructions to the jury were given by the court to support the law of the State of Tennessee in such a situation.

L. H. VOGEL

Chicago, Illinois

He Liked the Ruppin Article

I wish to applaud the article of Mr. Robert Ruppin, which appeared in the December, 1959, issue (Vol. 45, page 1257, A.B.A.J.). Not only do I approve of his article, I *know* that he is correct in stating that justice demands full and adequate information of the facts of the case, as well as the law, which the judges must need to know and which can only be surely obtained in the crucible of open argument and discussion. There is an excellent discussion along the same lines in an address by the Honorable John W. Davis, which I have quoted several times, the quoted passage being found at page 41 of the *Lawyer's Treasury* and also appearing in 26 A.B.A.J. 395 *et seq.* and which reads as follows "Lord Coke says—No man alone with all his uttermost labors, nor all the actors in them, themselves by themselves out of a court of justice, can attain unto a right decision: nor in court without solemn argument where I am persuaded Almighty God openeth and enlargeth the understanding of those desirous of justice and right." . . . Judge Dillon in his lecture on the "Laws and Jurisprudence of England and America", declares that as a judge he felt reasonably assured of his judgment where he had heard counsel and a very diminished faith where the cause had not been orally argued, for says he, "Mistakes, errors, fallacies and flaws elude us in spite of ourselves unless the case is pounded and hammered at the Bar. . ."

Without adequate oral argument there is no viewing, there is no opportunity for interrogation, and there is no opportunity for demonstration and for reminder of points not expressly written. . .

SAM R. FISHER

Houston, Texas

The World Court Cannot Become a Substitute for War To Remedy Injustice

In this article the author points out various objections to attempting to create a world rule of law which would bring about world peace through court settlement of international disputes. He makes an alternative suggestion for extending the powers of the General Assembly of the United Nations. This article is taken from an address delivered at the Columbia Law School Centennial Conference in 1958.

by Eustace Seligman • ***of the New York Bar (New York City)***

THERE HAS BEEN recently a renewal of efforts to induce the United States to abandon its existing hampering reservation to the acceptance of the compulsory jurisdiction of the International Court of Justice. This has been urged by some as a first step towards developing a world rule of law.

A leader of this broader program of achieving world peace by resort to courts is former President Rhyne of the American Bar Association who, in his Annual Address as President, said:

> To pull the world out of its present drift toward destruction, and to set it on the path of progress toward peace, a dramatic new approach to peace is essential. Settlement of international disputes through law in the courts is such a plan. We American lawyers have a tremendous duty and responsibility. We of all groups appreciate that law used in a world judiciary is the key to world peace.

Our instinctive reaction as American lawyers devoted to the cause of peace is to favor the proposal. Nevertheless there are weighty objections to it. I should like to outline these objections and also to make an alternative suggestion.

We are apt to consider that the creation of the United Nations was a step forward in promoting the world rule of law. To what extent is this the case? It is true that under the Charter nations have renounced the use of force except in self-defense. But if there is to be a world rule of law, is it not essential that a nation which has renounced force to obtain its rights should be able to obtain such rights by peaceful means?

Under private law, an individual cannot resort to force to collect a debt or to enforce some other right, but as a necessary corollary he can go into court and obtain his rights. A similar need exists in the case of nations if we are to have a world rule of law. As Secretary Dulles wrote in *War or Peace:*

> There can never, in the long run, be real peace unless there is justice and law. Peace is a coin which has two sides. One side is the renunciation of force, the other side is the according of justice.

The Charter, however, provides no method for a nation to enforce its rights if they are violated by another nation. The Suez incident is an illustration of this; Britain and France claimed a violation of treaty rights by Egypt but they were unable to appeal to any tribunal which could pass on the validity of their claim and enforce it if valid. Accordingly, they contended that they must be entitled to use force notwithstanding the apparent Charter prohibition.

One alternative to resorting to force in such a situation would be to create machinery to bring about the world rule of law which is now non-existent. This would require two basic changes in the Charter: The first would be that all members should be compelled to accept the compulsory jurisdiction of the Court. The second necessary change would be the creation of a means for enforcing decisions of the Court. At present there is only Article 94 of the Charter, which provides that if a party fails to comply with a judgment of the Court, the other party may appeal to the Security Council, which may, but is not required to, decide upon measures to be taken to give effect to the judgment. This article would have to be changed so as to require the Council to enforce all judgments of the Court by any means which were necessary. This change, to be effective, would also have to be accompanied by a giving up of the right to veto such enforcement measures.

Unless these changes were effected,

we could not bring about a world rule of law.

However, even if these changes in the Charter could be adopted—which politically seems most improbable—a further and more fundamental question arises as to the desirability of adopting them, and of bringing about a world rule of law similar to that of private law.

Merely to suggest this doubt will appear to many as regrettable. However, there is a question which must be faced.

The issue which is raised is whether law and justice are necessarily always synonymous, or whether law is not frequently a rule deemed generally desirable, but which may work injustice in individual cases.

An example from private law which illustrates this is the question as to whether a bona fide purchaser of stolen property should be required to give the property up to the original owner. The general rule is that the original owner recovers, but the opposite rule applies in the case of goods bought in market overt or in the case of negotiable instruments. Can both rules be characterized as just?

Or take the case recently in the New York courts: Is it just to require a reporter to divulge the source of his information, or should the privilege of confidential communications be expanded to include a statement to a reporter?

In the international field, the difficulty is even greater. An example of this is the traditional three-mile limit of the territorial sea, which is considered by many nations, including, among others, our friend and neighbor, Canada, as working an injustice upon them.

The Problem of Changing the Existing Rule of Law

Furthermore, the conflict between law and justice becomes accentuated when conditions change so as to require a change in the existing rule of law. In the field of private law, the need for such a change has been always recognized, and it has been accomplished in part by courts more or less frankly reversing themselves and in part by legislative action.

In the international field, the need of change is equally well recognized. To quote again from Secretary Dulles:

> Change is the law of life. New conditions are constantly arising which call for change lest there be injustice. Such injustices tend ultimately to lead to resort to force unless other means of change exist. Peace must be a condition where international changes can be made peacefully.

Can any legal mechanism be provided for making changes in existing rules of international law necessary to effect justice? In the absence of a world legislature, there is the alternative of giving the power to the court. Is this feasible? Or is not the growth of the common law an inapplicable analogy in the field of international law?

In our own country we have seen the serious consequences of the Supreme Court's reversal, in the interests of what it and a majority of us believe to be justice, of its prior decision on the segregation issue—even though the reversal was unanimous. It is proving difficult enough, in a comparatively homogeneous community united as one nation, to obtain acceptance of the decision in the South, which passionately proclaims its injustice; surely the reversal by the World Court of an existing rule of law on a similarly vital issue would not be accepted by a nation against which the judgment was rendered.

As long as separate nations continue to exist with different languages, cultures and institutions, and until we have a world federation—which is a far-distant goal—is it not inevitable that neither the United States nor any other country will be willing to give to a tribunal of men, however wise and impartial they may be, the final power, by majority or even unanimous vote, to change an existing rule of law on matters affecting their vital interests? On the other hand, is it not equally impossible to expect them to continue to be bound by a rule of law which is no longer fair, in view of changed conditions?

Finally, the question as to what is justice, in most international disputes of importance, is a political and not a legal question. Such matters as the construction of treaties are of course proper issues to leave to the court, and we should, in all treaties we enter into, agree to do this. However, it is wishful thinking to believe that there is an easy road to peace by going further and submitting all international disputes to the World Court for decision on legal grounds. In the case of Kashmir, for example: as a matter of law it unquestionably belongs to India, since the ruler of the country exercised the option given to him by Britain to accede to India. However, if justice is to govern, should not the wishes of the inhabitants be considered in deciding the question? If so, they would presumably favor joining Pakistan. Again, Governor Dewey proposed that we seek to have the question of the legal title to the offshore islands submitted to the World Court for decision; presumably welcoming an adverse decision as a face-saving method for Chiang to withdraw. But would the United States be willing to submit to the court the similar question of the legal title to Formosa, where the decision conceivably might be adverse to us if based on legal principles and if all other considerations, such as the wishes of the inhabitants or perhaps the defensive needs of the Philippines, were to be ignored? Quite certainly the answer to such a proposal would be no, and properly so.

If there are thus valid objections to attempting to create an enforceable world rule of law similar to that of private law, is our only alternative to give the Charter the construction which the British gave to it as one of the justifications for their action at the time of Suez—namely that the basic covenant in Article 2 of the Charter to refrain from the use of force has no application to a nation having no aggressive intent but merely seeking to enforce the continuation of its unrestrained use of the canal.

The obvious difficulty with this construction is that it emasculates the Charter. If every nation can unilaterally determine whether or not the use of force is permissible, the entire machinery to prevent aggression becomes

inoperative. No nation—not even Hitlerian Germany or North Korea—ever admitted to starting an aggressive war or one without just cause.

A Third Alternative Suggested

However, there is a third alternative that might be considered—intermediate between attempting to create a world rule of law and giving up all efforts to restrain aggression. It would be to amend Article 2 so as to provide that resort to force by one nation against another should not be prohibited if the second nation had refused to satisfy a complaint of the first nation, which a majority of the Assembly had found to be justified.

Such an amendment would accomplish two things.

First, the complaint would be presented to a political institution, the Assembly, and not to a court of law.

Second, a nation whose complaint had been found justified would be permitted to resort to force if necessary in order to get the relief it was entitled to. To this extent it admittedly would narrow the existing prohibition against the use of force. This may appear a step backward in our efforts to eliminate war, but that would not necessarily be the case. Furthermore, it would have the virtue of avoiding entering into agreements which we do not honestly intend to carry out under all conditions.

Whether the suggested amendment to the Charter could obtain the necessary votes is a practical question which cannot be answered in advance other than to say it would appear to be a possibility. If not, substantially the same result might be achieved by the adoption by the Assembly of a resolution which would provide for a vote by the Assembly as to whether a threatened use of force was, in the light of the existing circumstances, consistent with the purposes of the United Nations and therefore not in violation of Article 2. The two resolutions would together then constitute a mechanism for the submission to the Assembly of the question of whether the actual or threatened use of force in a particular situation would or would not be justified. If the decision were that it was unjustified, resistance by collective security measures would then be recommended. However, if the decision were to the contrary, the unilateral use of force would thereby be acquiesced in as justified. The effect of this would be to change the present basic charter concept of a prohibition upon all acts of aggression to a narrower one of a prohibition only upon unjustified resort to force. If this change were made without charter amendments, a conflict between the Security Council and the Assembly would be possible, which could, however, be avoided by a helpful use of the veto.

Such an amendment or resolution will not necessarily increase the resort to war; rather the threat of war may lead to the according of justice by the nation adjudged to be in the wrong. If it had been in effect it might have solved the Suez dispute without war. If a decision had been rendered against Nasser, and Britain and France had then threatened to use force, he would have probably complied with the decision unless perhaps Russia had intervened. On the other hand, if the decision had been in Nasser's favor, Britain and France in all probability would have given up any attempt to go against it by the resort to force which they in fact attempted.

Let us apply it to a case such as Formosa:

If for example the question were submitted by us to the Assembly as to whether a just solution of the existing threat to the peace would be to give the inhabitants of that island the right to vote to join mainland China or to be independent, a decision by the Assembly in favor of this solution would establish that Communist China would be guilty of unjustified use of force if it thereafter attacked Formosa.

On the other hand, suppose that the Assembly should decide that Formosa ought to be handed over to Communist China irrespective of the wishes of the inhabitants. This would be extremely unlikely today. However, there is no assurance that the decision of a majority of the Assembly will always be a just one according to our view of justice. While up to the present time the United States has had little difficulty in getting a majority vote in the Assembly on all issues in accordance with our views as to what is fair and just, with the continuous addition of new members this may not go on indefinitely. If that time comes, would we be willing to accept such a vote as an expression of world opinion and obey it?

In such an event, it is suggested that a legitimate distinction could be made between defensive and offensive use of force. Assuming that the inhabitants of Formosa should refuse to accept the decision of the Assembly, and an attack on it should be made by Communist China, then we could still, if we so decided, defend Chiang on Formosa. Presumably we would go through a soul-searching process before deciding not to accept the Assembly's decision, and we would no doubt be influenced by the size of the majority against us, how many large nations it included,

Fabian Bachrach

Eustace Seligman has been a member of one of New York City's largest law firms since 1923. He received his A.B. from Amherst in 1910, studied at Harvard Law School and the law schools of the University of Berlin and the University of Paris before receiving an LL.B. from Columbia in 1914. He is a contributor on legal subjects to various publications and has also written on United States foreign policy.

the extent to which it may have been brought about by fear of reprisals from the Communist countries, and so forth.

If we finally did so decide, we would not thereby be committing an act in violation of the Charter, even though the Communist attack had been recognized as justified by the Assembly. The Charter restraints would be inapplicable to such a case, and both parties would be free to act as if there were no Charter. Defensive action is clearly recognized as lawful under the present Charter, and would continue to be so even if the suggested change were to be effected and if offensive action were to be sanctioned by the Assembly in a particular case.

However, let us assume the case where offensive rather than defensive action would be necessary to enforce a claim we believed to be just, but where the Assembly had voted that our claim was unjust and that resort to force would be wrongful.

An example of such a case, involving not the United States but another country, would be an attempt by Pakistan to force India to withdraw from Kashmir in order to permit the holding of a United Nations plebiscite in that country, notwithstanding a vote by the Assembly that resort to force was not justified.

This kind of a case would be basically different from the defense of Formosa; Pakistan or we in a similar position would not be acting defensively but would be seeking to change the status quo for a reason which we were unable to convince a majority of the Assembly was a just one. Here, I submit, we should be willing to give up the use of offensive force to enforce our claim even though we considered a vital national interest to be involved, and should limit ourselves to other means of trying to attain our objectives.

A Concession in the Cause of Peace

To accept this restriction on our right to use force would appear to be a concession we should make to the cause of peace. It would be a more limited restriction than the one we have already agreed to—perhaps unwittingly and certainly unwisely—in the present Charter. It would be more limited than has resulted from our having accepted the compulsory jurisdiction of the World Court. Realistically, however, it is the maximum restriction which we can expect the United States or any other great power to live up to at the present stage of world development. It is a reasonable compromise position between those who object to any limitation on our sovereignty and those who would agree to leave all disputes to the World Court for settlement.

To close at this point would, however, give an incomplete and unduly pessimistic picture of the future prospects of peaceful settlement of disputes between nations. There is of course the very important conciliatory machinery of the United Nations which has been effective in a steadily increasing number of situations in inducing antagonistic nations to come to an agreement. And if the suggestion made above were to be adopted, it should not be assumed that the Assembly would lightly give the go-ahead signal to starting a war. On the contrary, we can be sure that efforts would be intensified to make use of every other possible alternative to solve the dispute, including, if necessary, resort to collective economic measures.

In addition, there is another approach of great importance, namely the entering into of multilateral or bilateral agreements or treaties between nations, dealing with both legal and political issues. A recent example was the conference on the law of the sea, held under the auspices of the United Nations in Geneva. Four different conventions were agreed to at this conference. On one issue only, namely the change in the traditional three-mile limit which has been referred to above, the necessary two-thirds agreement could not be obtained. However, this is not a ground for undue pessimism, because the compromise proposed by the United States, which preferred the existing rule but was willing to yield to the views of others, was successful to the extent of receiving the approval of a majority of the nations.

It is therefore to be hoped that possible sources of conflict between nations can increasingly be avoided by the machinery of voluntary agreements rather than the imposition of a settlement from without. Only if we recognize that mutual concessions must be made to the viewpoint of other countries as to what is justice, will we be able to attain that elusive but much desired goal of peace on earth between nations.

Finally, it should be noted that this article is not addressed to the question of whether the existing reservation with respect to disputes within the domestic jurisdiction of the United States, which was attached to our accepting the compulsory jurisdiction of the International Court of Justice, should or should not be changed. Rather, it is addressed to the far broader question of whether war can be averted and world peace achieved through the creation of a world rule of law to be applied by courts, or whether our objective must not be reached by the adoption of various different approaches, one of which, as noted above, should be our agreement, in all treaties we enter into, to submit disputes arising under them to the World Court.

Sound Economics Can Make Good Politics

Senator Wiley writes of the nation's economic health and the dangers of continuing inflation. He concludes with a proposal to create a National Economic Council for Security and Progress, to advise the President on economic matters, much as the National Security Council advises him on national defense.

by Alexander Wiley • *United States Senator from Wisconsin*

NOT SINCE THE Greenback Party heyday in the 1880's has there been as much congressional debate of economic-fiscal policies as there has been in recent months. Listening to the new economic prophets of cheap money at any price, of government pumping additional money into the economy and the inevitability of inflation—all in the name of full employment and growth, naturally—one may almost feel guilty to sound the "old-fashioned" notes of dollar stability and budgetary restraint.

Speaking recently to an American audience, the former president of the Central Bank of the Federal Republic of Germany had this to say:

> To a foreigner it seems almost absurd that there should be certain quarters in the United States where inflation is tolerated or even recommended. Surely any price to be paid for inflation must be excessive, considering not only the adverse economic and social effects, but the irretrievable losses in national prestige it may entail. Reports of inflation in the United States would not only mean the depreciation and ultimate devaluation of the dollar, but also an acute decline in the moral authority, power and international stature of the United States.

And on the lessons of inflation, German economists are certainly entitled to speak authoritatively. The devastating German run-away inflation of post—World War I years still serves as the classic anti-inflation warning in economics textbooks, and it is this lesson that has produced the present German economic vigilance and restraint. That close links bind a nation's prestige to its financial posture is evidenced from the manner in which the emergence of the German mark as a sound and stable monetary unit has enhanced the stature of the new Western Germany in the family of nations.

Yet, the full danger of inflation apparently has not yet been sufficiently realized by our "creeping inflation" advocates who continue to preach a theory as old as ancient Rome and the Greenback days, and already discredited that long ago. But this is one time when the man in the street is better advised than some of the economic experts representing him. For the hundreds of letters I receive each month from average Mr. and Mrs. America put the finger on a domestic enemy they fear most—INFLATION.

Is It Not Safe To Be Thrifty Anymore?

A recent survey of the country's economic situation concluded: "The gloomiest finding is a weakening of the resistance to inflation." True, most people yearn for economic stability, and four out of five persons interviewed thought that prices, wages and profits *should be held from going higher* for the next two years. But at the same time, these people had little hope that this will happen and seven of every ten thought that prices would *continue* to rise.

To the well-known economic perils of inflation may thus be added the psychological impact of this acceptance of the inevitability of inflation: an erosion of individual and public confidence in the soundness of our currency and economy, with resultant injury to the long-acquired habits of thrift and economic prowess.

A middle-income businessman recently interviewed on the question of inflation, responded thus:

> It just isn't safe to save anymore. I decided inflation couldn't be stopped. So I cashed in all my insurance and bought stocks.

The lack of faith in the cures of inflation, slowly turning into mass uncertainty, tends to accentuate the already existing problem and may turn the slow march towards inflation into a stampede. The present heights of the stock market are certain evidence of the population's desire to have its sav-

ings sheltered from inflation, through a rush into equity investments. What would happen to our economic balance if the present uncertainty turns into a material-value psychosis, with more bondholders, insurance holders and the like, all at once deciding to liquidate their assets?

The serious effects of the inflationary trend in recent years are easily ascertainable. The 1939 dollar today buys 48¢ worth of goods. The standard indicators of the decline of the purchasing power of the dollar, the Wholesale Price Index and the Consumer Price Index, have risen more than 50 per cent between 1946 and 1958. A survey of rising prices indicates that under Roosevelt, the cost of living rose 3.3 per cent annually and under Truman, the cost of living sprinted 6.8 per cent each year. (Of course, under Roosevelt we had war, and under Truman the post-war problems.) Since 1952, the rise in the cost of living has been held to an average gain of 1.4 per cent. In the last three years the increases in the Consumer Price Index have still been only moderate:—

1.5% in 1956
3.4% in 1957
2.7% in 1958
0.9% in 1959.

This slower increase which is referred to as creeping inflation, may not seem to be very large to the uncritical observer. But an annual rise of 2 per cent will wipe out half of the purchasing power of the dollar in thirty-five years, and a 3 per cent rate will result in a similar reduction in less than twenty-five years.

The proponents of inflation say there is no need to worry about inflation, as long as it is of the "creeping type". Since many labor contracts already have escalator clauses, it is suggested that such clauses might be extended to pensioners, insurance beneficiaries, bondholders and the like—thus permitting everybody to adjust their income with inflation. But it takes a little critical thinking to realize that not everybody can equally ride the escalator at the same time. And as one commentator has put it: "It is the height of folly to imagine that we can inflate without some groups paying the price."

A further weakness of the creeping inflation proposition is its assumption that we can police inflationary trends at will. But let us ask this of the proponents of creeping inflation: "How do you confine inflation and keep it down to a so-called 'delightful' and 'reasonable' 2 per cent per year?" It is not too difficult to see that inflation cannot be kept automatically within prescribed limits. For if the public becomes aware of an official policy to permit a limited depreciation of the dollar, it will try to protect itself, and by so doing it will inevitably accelerate the pace of the price rise. As one commentator put it:

> If the public knows there will be a creeping inflation of 2% per annum, then the 2% will be reached not at the end of the year, but at the beginning, and the pressure for inflation will mount.

It must be concluded, therefore, that unless remedial action is undertaken to curb inflation—a large and *increasing* section of the population will be exposed to its harmful and often devastating effects. Inflation, obviously, affects most adversely that part of the population that must depend on a non-varying income, or an income that does not vary as fast as the price increases —government workers, other public servants, school teachers, unskilled workers, bondholders, and the twenty millions of senior citizens and others living on annuities, pensions, social security and public aid. The list includes also the farmer who was traditionally thought to favor inflation because it acted to increase land values, but who currently finds himself unable to pass on his rising costs to the consumer. And due to recent population trends, produced by the growth in the population's life expectancy and the increase in the number of people in public service, an increasingly larger percentage of the people is placed in the inflation victim list.

The Future of the Dollar Is the Future of American Economy

The adverse effects of inflation are felt not merely on the purse of the individual American. Its direct impact on economic growth, periodic recessions and the balance of trade must not be underestimated.

Inflation hinders long-term economic growth by discouraging the savings which produce the capital necessary for the country's economic expansion. American economy must continue to expand in order to meet the increasing and more varied needs of the American people, and in order to hold back the growing Soviet economic offensive. The major key to future economic growth in America is increased productivity, and the greatest contribution to such an increase is the investment in new machines and equipment—but the magnitude of such an investment depends upon the level of savings.

This is a time when we can ill afford to lag behind. At present the Soviet industrial output is still estimated to be only 45 per cent of ours. But realizing that the rate of growth in Soviet production is about 9 per cent annually, while our annual growth is less than 3 per cent, it becomes apparent that with the situation remaining substantially the same the Russian economic handicap may disappear and they could catch up with us in as little as twelve to fourteen years.

The table that follows shows HOW LONG IT WILL TAKE THE RUSSIANS TO CATCH UP WITH US, if we do not watch out.

U.S.S.R. rates of industrial growth	U. S. Rates of industrial growth		
	2%	3%	4%
	Years	Years	Years
7 per cent	17	21	28
8 per cent	14	17	21
9 per cent	12	14	17
10 per cent	11	12	14

For those that still think about Russia as the backward industrial country of 1918 or 1928, this will come as a shock. But it is with this realization that we must look at the need of future economic developments in America—and such developments will not be possible in an economy crippled by inflation.

Inflation, furthermore by interfering with the free operation of the economic forces tends to make our recessions much worse and weakens our post-

recession recuperative facilities. The accumulation of excessive and burdensome inventories during inflation periods—because of the prospect of higher prices as inflation continues—saturates the markets to the point that they are unable to absorb new products, thus slowing down post-recession recoveries. Inflation, similarly, will lead industry to temporary over-expansions, due to the fear of increasing costs, but such expansions must eventually be followed by cutbacks, thus accentuating the problems of cyclical unemployment.

Inflation, finally, has adverse effects on our foreign trade and may cause the United States to be priced out of world markets. The high prices of American products, to which inflation contributes, weaken our competitive position abroad—where 5 per cent of what American factories produce is being sold, providing 5 million jobs for American bread-winners.

Unreasonably high production costs make us also much more vulnerable to foreign competition in our own domestic markets. While our 1958 export of manufactured goods still remained 2.4 times as large as our imports, the trend in the last two years has definitely been towards a more balanced foreign trade. It is now estimated that the 1959 exports of $15,900 million will exceed imports only by some $900 million, which appears like a disastrous drop in comparison with some of the recent exceptionally high excesses of exports over imports, running more than $6,500 million as late as 1957. But while remembering that the earlier unusual excesses were caused by World War II and post-war needs, and that no country has held such a lop-sided trade balance for very long, we must not, at the same time, permit our economy to be inflated to a position of competitive disadvantage. Several pockets of unemployment, in my state and in others, can already be attributed to our disability in specific industries, to meet the prices of our overseas competitors.

That the stability of the dollar is essential to the stability and growth of the American economy is all too obvious. What needs to be determined, however, is what measures would most effectively act to curb inflation. And one big question will then still remain: Will we have the wisdom, the courage and the determination to pursue the necessary remedies?

Inflation and the Prophets of Inevitability

Traditional economics explains inflation in terms of the supply and demand theory, saying that whenever an increasing amount of money is bidding for a limited quantity of goods, prices are driven up. Usually it is assumed that it is the government money printing presses that produce this increasing supply of money, either directly or indirectly—through fiscal and monetary policies and the operations of the Federal Reserve System. But what must be remembered is that more money in the market place does not always mean that new money is being created. More money bidding for goods could also mean that money hitherto in the hands of the population, but unused, is suddenly appearing from its hiding places to compete in the market. Thus while government fiscal policies and government spending have a tremendous impact on economic trends, fiscal and monetary manipulation alone will not halt inflation in a relatively free economic system. Certainly the government cannot be expected to do the job of inflation-policing alone. Since the reasons for inflation are manifold, only a comprehensive program which will take all factors into account will provide an effective remedy.

I am certain that there is no need to elaborate here on the factors customarily advanced as responsible for inflation. But it would be desirable to keep in mind the broad composite of the elements contributing to inflationary pressure:

(1) Governmental expenditures based on debt financing which by increasing the amount of money in circulation create inflationary pressures; (2) governmental overspending in areas where full employment already exists, thus creating excessive and price-raising demands for facilities and labor; (3) floors under commodities which raise prices higher than the level set by the free play of the forces of supply and demand; (4) excise and other taxes which penalize or hinder business growth; (5) excessive import quotas and tariffs, which permit the keeping of artificially high prices for some products; (6) inefficiency in management and inefficiency in production. (Listing the factors which are traditionally stated to be inflationary in terms of price levels *is not necessarily an argument against the practices named. For it must be realized that in our complex and comprehensive society some of these practices are quite essential for the protection of our social and economic way of life.*)

It is on top of these classical concepts of inflation that the new schools of economists have mounted their newer interpretation of modern inflation. And although the classic theories have not been totally discarded, the vogue these days is to give top listing to the two new theories of "cost-push" inflation and "administered price" inflation. The first, which is contrasted with the classical "demand-pull" inflation, is described as an upward moving wage-price spiral—a vicious circle in which higher wages cause higher prices, which in turn necessitate higher wages, ad infinitum. The second theory, again, explains inflation not as a product of free market play but as a result of the

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restrictive price-fixing schemes of big business.

In these new theories the prophets of the inevitability of inflation find the foundation for their dogma. Creeping inflation, say they, is the price that we must pay for the maximum growth of our economy. Growth, according to this school, has always been accompanied by inflation, and now too we have two alternatives: either economic growth inescapably accompanied by creeping inflation, or else, price stability accompanied by economic stagnancy and unemployment. And the choice, so they say, is ours to make.

These prophets of inevitability have been divided into two schools—those putting the blame on labor and those attributing it to industry. According to the first, the rise of strong trade unions makes it almost inevitable that economic expansion will be accompanied by rising labor costs. Thus when the rate of expansion is sufficiently high to produce virtually full employment, unions are in a strong position and are able to raise wages far faster than the increases in output per man-hour. Accordingly, the fact is cited that during the eleven years of 1947 to 1958, hourly earnings in all private industry rose about twice as fast as real product per man-hour—for while the rise in hourly earnings was 66.7 per cent, the rise in real product per man-hour was 33.6 per cent. It is to these extra wages, unmatched by additional products, that inflationary pressures are attributed. To prevent any further inflationary moves, claim the critics, it is industry's duty to stand fast on present wage contracts and not permit any new unjustified wage increases.

Labor, on the other hand, is proposing to find the main reason for inflation in industry. Post-war wage increases are therefore shown to be merely chasing prices up, and labor is pictured as attempting only to restore the real value of labor earnings. Even as middle of the road a reporter as *Business Week*, in commenting on the role wages played in post-war inflation, found that "unit labor costs seem to have followed prices uphill through most of the post-war years". If labor is not responsible for inflation, the real culprit must therefore be elsewhere. It is here that the theory of "administered prices" comes into being, a theory which charges business with eliminating the flexibility of the free market, and creating a new type of inflation by monopolistically and artificially maintained high industrial prices.

To determine the existence and extent of "administered prices" practices the Antitrust and Monopoly Subcommittee of the Senate, of which I am a member, has been conducting extensive hearings for the last two years. These hearings dealt with the problem of administered prices in the automobile, bread, roofing and steel industries. One of the measures proposed as a cure to this problem is Senate Bill 215, introduced by Senator O'Mahoney, which seeks to keep the prices of key products down by exposing the big corporations, in a selected number of industries which seem to set the price pattern, to public opinion pressure through a requirement that no price increases be undertaken without prior public notice and a hearing to justify such increase. But although self-restraint on the part of industry in setting prices is to be much desired, I question the wisdom of this bill's interference with price and market flexibility. Still, if industry and labor do not develop a more responsible economic attitude, legislation of this type will become necessary.

But whether subscribing to one of these new theories or the other, several of the "new" economists allege that the new facts of American economic life will make ineffective the standard measures designed to fight inflation. An economy that is geared to growth and is favorable to high employment, say they, is also favorable to increased prices. Thus, "so long as demand is near full employment levels, we must expect that in industries characterized by strong firms and strong unions, prices and wages will react on each other in a steady upward spiral".

The desirability, and indeed the necessity of American economic growth, we will most certainly accept. But that inflation is here to stay, and that more of it is still coming, is not, in my opinion, a necessary conclusion. Economic facts and developments are in a constant state of flux, and I believe that a reappraisal of many accepted economic assumptions may raise serious doubts as to the soundness of the predictions of the inflation prophets. Furthermore, inflation can be fought and must be fought, but like all other social maladies, the remedy is not simple or speedy.

A Program for an Anti-Inflation Offensive

A recent study of the relationship between economic growth and inflationary trends has produced some interesting new comments on the relative independence of the two. "Despite popular opinion to the contrary", says Edwin L. Dale in the *New York Times Magazine*,

> inflation has not been the normal condition of the American economy. It has been neither usual nor unusual. Prices were lower in 1890 than they were at the end of the Civil War, and the period was one of fairly rapid economic growth and expansion. Prices were stable during most of the Nineteen Twenties. A great deal of the price rise in the past 150 years has been associated with wars and their immediate aftermath.

Accepting the thesis of the war's responsibility for inflation, some economists forecast only very limited future rises in living costs, now that the post-war adjustment has finally set into effect. It is their view that the use of the classic weapons against inflation, in recent times, was still being blunted by the spending and lending powers generated by World War II. Since the banks emerged from the war with $90 billion worth of government securities and only $26 billion of loans to their borrowers, any government attempts to tighten the money market were ineffective since the banks could simply sell some of the security reserves to get the funds to make more loans.

But now, some fourteen years later, the country is finally growing out of the enormously inflated money supply with which the economy emerged from the war. In the more or less normal peacetime prosperity of the 1920's, the

(Continued on page 329)

The Practice of Law as a Career

Mr. Szold writes of the work of the lawyer and of the qualities that are needed for success at the Bar. His article is taken from an address delivered to the students at Knox College last year.

by Robert Szold • ***of the New York Bar (New York City)***

WHAT IS THE practice of law? What does a lawyer do? What is the type of activity?

A lawyer advises clients as to their legal rights and obligations. A client may need advice in contemplation of a business transaction. He may need advice after he is in trouble.

The modern practice of law comprises a host of aspects. The variety is so wide and the range so diverse that simple definition does not suffice. One may illuminate by description, and elucidate by illustration. Broad classification may distinguish between the office lawyer and the trial lawyer. Specialties may be noted, such as admiralty; taxes; patents; corporation law; criminal law; real estate; torts or negligence; labor; wills and probate matters; administrative tribunals; and government representation.

Lawyers serve the government in the offices of the District Attorneys, in the departments in Washington, and in the numerous federal and state commissions and administrative agencies.

During the twentieth century the size of the business unit has grown so that large corporations have their own lawyers, whose offices are on the corporate premises, who often are called "house counsel". The matters with which they deal cover many subjects and embrace many specialties.

Many independent lawyers in the large cities seldom go to court. They deal with such matters as bond issues, security transactions, contracts, pension plans, mergers, consolidations and acquisitions of competing property or businesses which may raise questions under the antitrust laws. Other lawyers in large offices deal solely with decedents' estates, the drafting of wills and the administration of estates and trusts.

Frequently the rights or claims of a client bring him in conflict with those of another person. In such a case, litigation may ensue. The office lawyer must be competent to estimate the probable outcome of litigation.

While over the past several decades the bulk of legal activity has shifted from the courtroom where cases are tried, to the office where business is advised, nevertheless our judicial system is so largely based on the trial of cases by adverse parties before courts, that an understanding of this system should be helpful.

A time-honored procedure has developed in Britain and the United States for the adjudication of disputes and for the determination of the proper application of established legal principles, as well as for the achievement of justice in a particular case. This system is of adversaries represented by lawyers, who present their clients' claims to a judicial tribunal, *i.e.*, to a judge or a judge and jury. Experience has shown this to be a valuable method of eliciting truth. The lawyer, loyal to his client, presents his client's case. The opposing lawyer, loyal to the opponent, presents the opponent's case. The written pleadings required from each adversary are designed concisely to present the issue, either of law or of fact or of both. Evidence is introduced. The tribunal then determines. Trial procedure, as developed over the centuries, is designed not only to define the issue, but also to guarantee fair and just results. No supreme arbitrary governmental authority may intervene in a trial to impose its power on the litigating parties. Many of our established traditions of fairness are embodied in the constitutions of the several states and of the United States of America.

A practicing lawyer must be learned in the law. He must know not only the established decisions of the courts, but also the pertinent statutes. He must be able to draft documents. He must be able to write briefs. He must be able to use the law books. A lawyer who only knows book law, however, is inadequately trained. He must have experience. A client needs not merely to be told the abstract principles. He requires sagacious advice as to their application to the facts at hand.

In order to gain experience, the beginning lawyer today commonly works as a clerk in, or obtains a connection with, an established firm. This period may last a few or several years, during which he prepares legal memoranda, drafts pleadings, forms corporations, goes to court on minor motions, tries minor cases. To draft the first contract may seem an entry into a bewildering mystification. In time, the young man emerges from the status of assistant or junior. He then handles the affairs of clients without immediate supervision. He does not expect forever to be an employee. He looks forward to a career as a professional man, either in partnership, or on his own. He hopes to obtain objectivity and to attain independence.

This cursory examination of the type of activity may be concluded by quoting Mr. Justice Brandeis, who said

that the law is "... an occupation for which the necessary preliminary training is intellectual in character, involving knowledge and to some extent learning as distinguished from mere skill, an occupation which is pursued largely for others and not merely for one's self, and an occupation in which the amount of financial return is not the accepted measure of success".

What Are the Prospects for Advancement?

The comparative statistics of financial rewards do not encourage young men to enter the legal profession. Business certainly affords greater financial returns. Physicians and dentists have higher incomes than lawyers.

A recent report prepared for the American Bar Association by the Special Committee on Economics of Law Practice is partially entitled "Lawyers' Economic Problems..." From this report, it appears that "The employees of all industry showed a gain in average annual earnings of 131% from 1929 to 1951, but the income gain of lawyers was only 58%." Further the report states that "In 1954, the net incomes (before income taxes) of one-third of all practicing lawyers were less than $5,485.00." The statistics show that the mean income of non-salaried lawyers in 1951 was $8,730 as compared with $13,432 for physicians. The report concludes "... that the legal profession has not kept its economic house in order". Lawyers customarily work far harder, far longer hours, employ far greater intellectual competence than their contemporary businessmen. Legal ability is concentrated in the large cities, and competition is keen. During the past generation, the scale of fees has not kept pace with the decline in the real value of the dollar. Corporate employees and executives are not affected by the graduated income tax as are lawyers. Corporate officials and executives are afforded stock purchase schemes, plus pension or retirement plans. None of these is available to the usual practitioner in the legal profession.

The statistics from the American Bar Association are not to be deemed the criterion for the man of extraordinary talent. He scorns "average", or "median", or "mean" figures. He knows that the practice of law still yields opportunity for substantial financial success, as well as for distinguished professional achievement. There is always room at the top.

The Lawyer's Compensations Are Not Monetary

By and large, however, the lawyer must look to compensation other than monetary. He may find satisfaction in intellectual activity; in a certain degree of personal independence; in the trust of his fellows; and in the feeling of well-being derived from a reputation for reliability and trustworthiness. He also knows that law and order are indispensable to civilization.

Seldom does the modern lawyer have the stimulus of a great political cause as did Otis in pre-revolutionary days, or Alexander Hamilton in defending freedom of speech in the *Cosgrove* case. Nevertheless, the practice of the law may yield satisfaction by way of participation in causes. The lawyer of fifty years ago might have thrown himself into the defense of social welfare legislation, such as the child labor laws. When labor was the underdog, the lawyer could have found satisfaction in fighting against the abuses of the *ex parte* injunction, when the restraining order was issued without notice to the other side. Today he may find satisfaction in such a public cause as slum removal, urban redevelopment and adequate housing for the lower income groups. Again, he may feel that consolidation of power in the great corporations is a social evil, so he may assist the small businessman, or engage in antitrust work. He may be attracted by such new areas of law as have to do with nuclear energy. He may participate in a Legal Aid Bureau. Generally speaking, however, he who has decided to become a lawyer—whether by reason of deduction resulting from the analytical process applied to his situation, or by reason of advice of friends and family, or by reason of instinctive groping (Abraham Lincoln probably had no career consultant)—will find his satisfaction primarily in intellectual activity.

A lawyer should possess: (1) integrity of character; (2) intellectual curiosity; (3) capacity and desire for sustained disciplined effort; (4) ability to seize upon the essential facts; (5) courage.

(1) *Integrity of character* involves scrupulous regard for obligations as a member of the Bar and as a citizen, far beyond the call of duty; a sense of honor; an affirmative unshrinking all-pervasive personal attribute which has no reservations, and brooks no qualifications. A lawyer owes loyalty to his client. But he may not forget his obligations to the court. He is an officer of the court (no mere empty phrase), who must temper zeal with integrity.

(2) *Intellectual curiosity* signifies more than intelligence, however acquired. Information, culture, learning are all good, all essential; more, however, is needed—an inner compulsion to search for the truth.

(3) *Capacity and desire for sustained disciplined effort.* No one should consider law as a career unless he wants to work. A lawyer practices in an exacting and demanding profession. He must make no mistakes. He must work hard even before he becomes a lawyer. In order to remain at a good law school, he must put in long hours of high concentration. A law school is made, to be sure, by its great professors, but more is it made by its student body. Excellence vies with excellence. Contact of a good student with the functioning minds of his fellows brings out the best in his own.

(4) *Ability to grasp the essential facts.* An illustrious lawyer, an ex-Secretary of State, in commenting upon the qualities that made a Justice of the Supreme Court one of the half-dozen greatest in the history of that august body, said that the most severe stricture which that Justice could pass upon another was: "He did not know his facts".

In any legal case the facts are all important. One cannot apply the law unless he knows the facts. A good lawyer, moreover, has the capacity to distinguish between the important and the unimportant, between the essential and the peripheral, between the decisive and the merely interesting. A good lawyer has the ability to wade through a mass of complicated, sometimes con-

flicting, items, recognize the crucial one and present that one clearly and sweepingly.

(5) *Courage.* The lawyer must have the courage of his convictions; the courage to defend the client with an unpopular cause; the courage upon which his client may rely; the courage which sets the client's case before and above any personal consequences to himself.

Preliminary Training

British judges are commonly accredited to be better than American judges by reason of their broader general cultural and educational background and training. The lawyer's cultural and educational background cannot be too broad. If the thesis is sound that the successful businessman must be grounded in sociology, anthropology and the humanities generally, how much more does the thesis hold for lawyers. One cannot, for practical purposes, concentrate on only one or two subjects.

If, however, by way of academic hypothesis, choice were made of two subjects on which to concentrate, college students should select first, mathematics, and second, history. Mathematics for the discipline. History for the experience of mankind. The precision of mental process needed for legal analysis may be fostered by mathematics. The wisdom needed for handling recurring human experiences may be buttressed by history.

At some stage, preferably after law school, a course in corporate accounting is desirable. Training in accurate use of the English language is highly desirable. As Dean Roscoe Pound, in stating that clients' property rights may depend upon draftsmanship, has said: "When a case goes to court, a lawyer cannot say to the judge: 'Your honor, I actually meant to say it this way . . .' It may be too late then."

The educative process, in any event, is never finished. The law school graduate, emerging with diploma, knows more of existing law than ever after in his life. But he must continue to read, to study and to think. If school has taught him to think, it has given him his most valuable course.

(c) Which law school? Go to the best. Inasmuch as the excellence of the student body determines the excellence of the law school, and the excellent law school attracts the best minds from colleges all over the United States, the best law school of one generation is apt to be the best law school in the next. While grades are not the sole test by which a young lawyer seeking a job is evaluated, grades in a good law school are an important test.

Judge Learned Hand, perhaps the greatest living Federal District or Circuit Court Judge, said last year at his *alma mater* in concluding his Holmes Lectures on "The Bill of Rights":

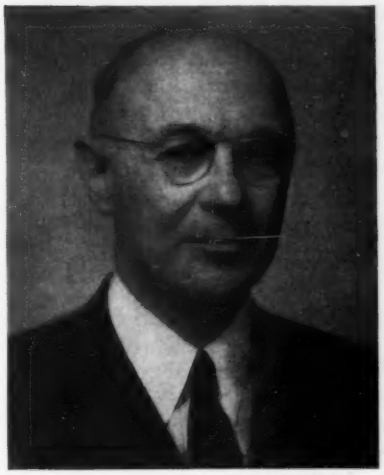
> More years ago than I like now to remember I sat in this building and listened to—yes, more than that, was dissected by—men all but one of whom are now dead... I carried away the impress of a band of devoted scholars; patient, considerate, courteous and kindly, whom nothing could daunt and nothing could bribe. The memory of those men has been with me ever since. Again and again they have helped me when the labor seemed heavy, the task seemed trivial, and the confusion seemed indecipherable. From them I learned that it is as craftsmen that we get our satisfactions and our pay. In the universe of truth they lived by the sword; they asked no quarter of absolutes and they gave none. Go ye and do likewise.

To the student considering medicine as a career, I recommend the volume by the Flexners on *William Henry Welch—and the Heroic Age of American Medicine.* In similar vein, to students considering law, I recommend Catherine Drinker Bowen's *The Lion and the Throne*, a book on the life and times of Lord Coke; and Schachner's biography of Alexander Hamilton.

The student asks information on practical matters—such as (a) the size of the office to join; (b) the size of the city in which to locate; and (c) government employment. No pat answer covers all men. To the young lawyer who asks whether he should go in a large or a small office, let it be said that each has its advantages and its disadvantages. The large office is likely to afford more interesting intellectual activity than the small office. Over a long life, financial rewards from the large are greater than those from the small office. On the other hand, the young law school graduate employed in a large office sometimes is stuck with purely administrative matters for an indefinite period, such as filing and indexing voluminous papers in one case. The small office is apt to afford opportunities for more general experience, for greater responsibility, and for dealing with clients.

The young lawyer seeking a job in a large city office should go into an office where the atmosphere is wholesome; where the oral stipulation is as good as the written; where no corners are cut; where after a few years, if he leaves, he does so with decent respect for the Bar, for the courts and for his responsibilities, and with the good will of his associates. These considerations, *i.e.*, the atmosphere and the reputation of his office, are more important than either compensation, or type of activity. A lawyer should never slip, unwary and unobserved, into unworthy procedures.

As to the size of the city: The larger the city, the greater are the prospects



Fabian Bachrach

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of material success, and of importance of subject matter; but also, of increased competition (whether in the same or in other offices); of greater social and economic pressures; of lesser personal independence; of lesser civic usefulness; and even of anonymity. Choice of the smaller city is to be encouraged both for the sake of the country as well as for the sake of the individual. The smaller city affords prospect for greater variety of subject matter; for more rewarding human contacts; for higher standards of professional relationships with judiciary and Bar; and easily for more useful civic life. Athens, at its greatest period, was a small community. Again, however, generalizations cannot fit every particular case. The older lawyer may offer information, even counsel. The younger will choose for himself.

Government work is valuable preparation for subsequent private practice. The young man in the District Attorney's office is thrown into the trial of cases. Some of the best men of the law school graduating classes seek a one-year clerkship with eminent judges. In the Department of Justice in Washington, and among legal staffs of the numerous government agencies are many openings which afford opportunities for valuable experience.

These several considerations may be regarded as informational, even interesting, but also perhaps secondary, rather than determinative. Are there more basic considerations?

What, you may ask, is the law? What is its origin?

The law furnishes the rules of human conduct in a civilized society. Dean Pound has indicated that the law is reason, tempered by experience. Dean Pound is the father of the sociological school of jurisprudence.

Certain legal philosophers have indicated that law is handed down by the sovereign of the relevant territory. He is pictured as brooding in the heavens above and by his will, fixing the legal consequences of all acts under his jurisdiction. This is known as the territorial theory. But the derivation of law is not so simple. Judge Cardozo's volume on the *Nature of the Judicial Process* has demonstrated that law does not derive or originate in such fashion. The law is that which the courts decide, having in mind (a) precedent; (b) justice; (c) logic; and (d) social utility. Precedent is necessary in order that there be certainty. Men must be able to know the rules. Logic enables the rules to be applied with reason. Justice must be attained in the particular case. The law must ever adapt itself to the social requirements of the age.

The practice of the law changes from generation to generation. The law itself changes.

Whereas one hundred years ago the decisions had to do with the acquisition of property; today, courts deal also with its use or disposition. Thus, the cases today frequently are concerned with distinctions between income and principal, matters not of moment a century ago.

Income taxes were unimportant prior to the constitutional amendment which was ratified in 1913.

A classic example of the adaptation of the law to changing social requirements occurred with riparian rights. Under the common law of Blackstone, the riparian owner of land had the right to take all the water he wanted from the stream passing his land. That rule did not fit the arid Western desert where the owner at the top of the stream could not be allowed to deprive those below him of their due share. Therefore, more equitable rules were evolved.

Not long ago a consumer, who bought from a retailer, who in turn bought from a manufacturer, had no remedy against the manufacturer for injuries resulting from defects in the article manufactured. It was said that there was no privity of contract between the ultimate user and the manufacturer. Today, recovery against the faulty manufacturer is a commonplace.

Several decades ago the workman injured by the negligence of his fellow workman had no recourse against his employer. He was held to have assumed the risk. That was the law. Today, workmen's injuries are covered by compensation insurance. Employers' liability cases no longer clog the courts to aggravate the law's delays.

A marked change has taken place in the last generation in the legal obligations of corporate directors to their stockholders; and of dealers in corporate securities to those with whom they deal. The notions of the fiduciary, and of his obligations have been expanded.

The history of the law is replete with instances of its adaptation to new social requirements.

Law provides the rules of conduct for the pertinent period. Without law, there is chaos and anarchy. With decent regard to precedent, the rules must be modified from time to time. In every change, lawyers are active. Those who take pride in their profession strive that the rules provide ever greater certainty, justice, logical application and social utility. Efficient lawyers not only know the existing precedents, but also possess prescience to advise clients as to probable changes.

The lawyer, therefore, is not required to lead a humdrum life, nor be consumed with a continuous succession of trivialities. Lawyers, indeed, are the ones who effected those changes in the law, of which the instances given are fragmentary illustrations. Lawyers will produce the future advances, which will come in this ever-changing world. Not all lawyers will be prominent in the process and achieve fame. Renown is reserved for the few. But every lawyer may share in the work. Every member of the profession should feel that he has a calling, not merely a means of livelihood. He should possess a sense of dedication, which will carry him through the dull periods, enable him to live a full life, and furnish him a vista of personal participation in the work of the world.

The career of the law affords to the able, diligent student opportunity for useful and constructive life.

Please do not choose the law because of default; or because no other choice is more compelling; or because of a vague notion that you may always shift to something else. Do not become a poor lawyer. The national interest in the conservation of human resources should not permit such waste. If you would be a lawyer, be one in the great tradition of the profession.

Eavesdropping and the Law

The New York Constitution contains a provision that prohibits wiretapping except under court supervison. The validity of this section of the state's constitution was clouded by the language of the Supreme Court in *Benanti* v. *United States*, decided in 1957. Mr. Savarese deals with the whole problem of wire-tapping, arguing that Congress should take action to assure that this tool is not taken from the hands of state and local law enforcement officers.

by Anthony P. Savarese, Jr. • *of the New York Bar (New York City)*

INVASIONS OF PERSONAL privacy by wiretapping and other methods of electronic eavesdropping have been much in the news in recent years and have figured in many important court trials and decisions.

The use of wiretapping by law enforcement officers, and the conflicting federal and state statutes and rules on the admissibility of evidence thus obtained, have brought forth strong and differing opinions by our courts.

The United States Supreme Court's most recent leading opinion in this area, *Benanti* v. *United States*, **355** U.S. 96, decided in December, 1957, by Chief Justice Earl Warren for the unanimous Court, used very strong language against the divulgence of wiretapping and stated that the Congress "did not mean to allow" such state laws as New York's constitutional amendment of 1938, which established court control over law enforcement wiretapping.

In April, 1959, New York State's Court of Appeals decided three cases which had been argued under the *Benanti* decision. In all three it found for the prosecution. However, in the case of *Broady* the majority found one argument so serious that it was impelled at great length to argue away the possibility that the Congress may have pre-empted the entire field of wiretapping and even superseded New York State's power to punish the crime.[1] A dissenting opinion specifically raised the question whether New York's entire system of law enforcement wiretapping had been rendered "ineffectual".

Together, these opinions amounted to a strong warning that the police power of New York and all other states, in the area of wiretapping, is in serious jeopardy until and unless the Congress gives a more explicit and clear assertion of its intent than is set forth in the thirty-one words which are its entire statutory expression on the subject and the entire basis for Supreme Court rulings on the subject.

Two of these New York cases were appealed to the United States Supreme Court—one by specific permission of the Court of Appeals and one by application for *certiorari*. The Court took its summer recess without acting on them, but on convening in October it announced refusal to hear arguments in either case.[2]

The Supreme Court refused to hear a contention that the Federal Government had superseded the states' right to punish wiretapping.

These actions of the Court for the time being take off the heat from an issue which should be of concern to every state attorney general and member of the Bar interested in preserving the police power as reserved to the states under the Tenth Amendment. However, this non-committal action does not remove the *Benanti* case, which still stands as a puzzling threat and challenge to state powers in this area. Nor does it remove the fact that the Congress has so inadequately expressed its intent in the area that it has, in effect, forced the Supreme Court to assume its legislative function. In other words, nothing is settled.[3]

For the last four years it has been my duty to study these matters, as Chairman of New York's Joint Legislative Committee on Privacy of Communications. On this Committee's initiative, in 1957 and 1958, New York enacted legislation greatly increasing the protection of personal privacy against eavesdropping by modern electronic devices—which includes wiretapping.

For the first time anywhere, New York in 1957 made it a felony for any person not present at a conversation to overhear the conversation, intentionally, by any secret listening device—that is, a hidden microphone or "bug". Offenders have already been sent to prison in New York for this newly de-

Prepared with the research and editorial assistance of Howard F. Cerny, Counsel to the New York State Joint Legislature Committee on Privacy of Communications and Licensure of Private Investigators, and Hickman Powell, Consultant to the Committee.

1. *People* v. *Broady* 5 N.Y. 2d 500 (1959).

2. *Broady* v. *State of New York*, appeal dismissed in a *per curiam* opinion announced on October 12, 1959; *Dinan* v. *State of New York*, certiorari denied on October 12, 1959.

3. The unsettled state of federal law on this subject is dramatized by an opinion in the United States Court of Appeals by Judge Harold R. Medina rendered on February 11, 1960, just as this article goes to press. In this two-to-one decision, the court stayed the use of wiretap evidence against a lawyer charged in Bronx County court with conspiracy to blind a girl. On the ground that divulgence of such evidence would be an "additional" violation of federal law, "surely the delicate balance between federal and state functions", said Judge Medina, "does not require the federal courts to sit idly by and countenance or acquiesce in persistent and repeated violation of federal law." It is notable that Judge Medina also wrote the intermediate decision which was unanimously reversed by the Supreme Court in the *Benanti* case.

fined crime—an act certainly as reprehensible as tapping a telephone.

In addition New York in 1957 strengthened its old prohibition against telephone wiretapping, originally passed in 1892. An unfortunate court opinion in 1950[4], holding that a telephone subscriber might have his own wire tapped, had opened a loophole which permitted professional wiretappers to operate with virtual impunity. The 1957 statute nullified this court-established law; in New York today, by action of the legislature and the governor, any wiretapping by a private person is a felony, without exception.

Further, we tightened the procedure under which New York law enforcement officers are prohibited from wiretapping except under the authority of a court order, issued on reasonable cause. This court control of the almost universal practice of wiretapping by law enforcement officers was established by a constitutional amendment adopted in 1938[5], modelled on the Fourth Amendment's provision for search warrants; and the system has worked so well for twenty years that it has the overwhelming support of New York State's legislative, executive and judicial officers. Adding to it, New York in 1958 established comparable court control over use of secret microphones, "bugs", by law enforcement officers.

Under the foregoing legislation, the use of wiretaps or secret microphones was defined as eavesdropping, a modernization of an old offense in common law[6]. Together with various corollary provisions, the law described above comprises a comprehensive scheme for the protection of privacy. Nothing comparable had existed in the law of any other state. And the only federal enactment in this area is, as shall be set forth in this article, thoroughly inadequate and negligent legislation.

Legislation in Massachusetts

It is encouraging to note that in 1959 (effective in November) the Commonwealth of Massachusetts enacted legislation comparable to New York's. It provides two years' imprisonment for "eavesdropping"—secretly overhearing or recording any conversation—either by electronic device or wiretapping, by anyone except upon court order applied for by the Attorney General or District Attorney (not the police). It is a great advance over the earlier, ineffectually drawn statutes by which Massachusetts (and California) had undertaken to control "dictagraphs" and wiretapping.[7]

This article was begun as a thorough review of the law in this field from the beginning, with detailed discussion of the present New York law and its development. This was done, in many thousand words, with copious footnotes, and with considerable pride. Now, for reasons of space, all that is reluctantly put aside, important and interesting as I believe it to be. Of far more urgent national interest is the question of the police power of the states, as it arises in the *Benanti* decision and the cases which were and may be appealed under it. As now presented, this article will deal almost exclusively with that. Our recent New York legislation is irrelevant to this discussion, for the cases arose under earlier law. Also we are concerned here only with wiretapping, for the Federal Government and courts have never concerned themselves with eavesdropping by secret microphone. Indeed, the Supreme Court has never dealt with wiretapping except as it affected prosecution evidence.

The situation to be unfolded here has aspects which would have merited attention by the best satiric talents of Gilbert and Sullivan. Since 1934 the federal courts have labored earnestly and industriously to divine what the Congress meant in thirty-one pertinent, but cryptic, words in Section 605 of the Federal Communications Act of 1934[8]. In all its existence the Congress has never passed any legislation, except this brief clause, which can be related to the subject of eavesdropping. These thirty-one words were a most minute and unobtrusive particle in a vast act of some 20,000 words, setting up comprehensive federal regulation of the telephone, telegraph and broadcasting industries. They were, indeed, a small part of Section 605 itself. They were never debated by the Congress or mentioned in its committee reports[9]. They have, however, been endlessly debated in the courts; and on these words alone (not on any constitutional basis) the Supreme Court has erected a vast superstructure of case law explaining the intent of Congress.

Meanwhile the Congress, sitting regularly across the street from the Supreme Court through all this quarter-century serial story, alone has the real key to the mystery of congressional intent.

As an unpretentious lawyer, I now wish to make it clear that I do not criticize the earnest efforts of the Supreme Court. As a legislator, I find that by inaction the Congress has created a legal situation with definite elements of absurdity.

Above the plane of ridicule, this situation merits the utmost concern of all those who believe in clear legislation for the protection of privacy and in realistic legislation for the detection of the activities of enemy agents and organized racketeers. Even more, it should concern those interested in preserving the powers of the states, particularly the police power. In all of this the Congress has failed to assert itself, and thus forced the Supreme Court to create the law of the land, which was certainly not contemplated in the Constitution.

Wiretapping Before 1957

Before discussion of the *Benanti* case and subsequent actions under it, certain historical background is in order.

4. *People* v. *Appelbaum*, 277 App. Div. 43, 97 N.Y.S. 807 (1950), affd. without opinion 301 N.Y. 738, 95 N.E. 2d 410 (1950).

5. Article I, Section 12, New York State Constitution; also Section 813 a and b, Code of Criminal Procedure.

6. Article 73, New York Penal Law.

7. Massachusetts General Laws, Chapter 272, §99. In 1954 the Massachusetts Legislature had passed a bill for Court control of law enforcement wiretapping, modelled on New York's law, but it was vetoed by Christian A. Herter, then governor of the state, not because he opposed wiretapping but on the ground that the proposed court procedure would interfere with the speed of crime detection.

8. Title 47, U.S.C.A.

9. In 1954 Herbert Brownell, Jr., then Attorney General of the United States wrote an article (39 CORNELL LAW QUARTERLY), presumably backed by authoritative research in his department, in which he stated in a footnote:

> The debate on the Federal Communications Act was strangely silent on section 605. Not one word is said about making evidence obtained by wire tapping inadmissible in evidence or about prohibiting wire tapping. Even the Olmstead case is not mentioned. From the Senate and House reports, it appears that the purpose of the bill was merely to create a Communications Commission with regulatory powers over all forms of electrical communication.

In this article Mr. Brownell argued for federal legislation making wiretap evidence admissible in national security and kidnapping cases.

As we have seen, New York made wiretapping a felony in 1892, but the police never considered that this applied to them. Many other states have followed New York's old statute; and surely the police elsewhere have, like New York's, made wiretapping a standard procedure in the investigation of crime. This police practice was challenged in New York County only once, when in 1916 a police commissioner was accused of obtaining wiretap information. The court dismissed the charge from the bench for what it called "the all-sufficient reason" that the commissioner had committed no crime but had effectively done his official duty.[10] Thus the matter stood, in New York State, until wiretapping became an issue in the Constitutional Convention of 1938.

Meanwhile law enforcement wiretapping increased mightily during the prohibition years. It was used not only by local police but intensively by U. S. Treasury agents and federal prosecutors in combating the growing power of the bootlegging underworld.

In 1928 wiretapping became an issue before the United States Supreme Court in the celebrated *Olmstead* case. The Court, in a five-to-four decision, rejected the contention that wiretap evidence was inadmissible under the "search and seizure" provisions of the Constitution.[11] The dissenting views of Justice Holmes, joined by Brandeis, Butler, and Stone[12], were to be extremely influential in forming a body of public opinion that wiretapping was "dirty business". But the *Olmstead* case still stands as law.

This Holmes view in 1934 found that the Supreme Court interpreted as implementation through the vast Federal Communications Act, in the thirty-one pertinent words which are basic to this entire discussion. These words from Section 605 are:

> no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person.

In 1937 the United States Supreme Court again considered the admissibility of wiretapping evidence and held[13] that these words of Section 605 prohibited federal agents from disclosing such evidence. Hence the evidence was excluded, under the rule of the federal courts, as illegally obtained. In effect, wiretap evidence had been held admissible under the Constitution, but was now inadmissible in federal courts under Section 605.

Such was the situation in 1938, when New York's leading lawyers and jurists met for the state's constitutional convention, at which wiretapping became a major issue. Surely the delegates were well aware of these recent developments in federal law, but they seem not to have been overly impressed. Without going back to the debates, we may be sure that their thinking was based upon the police power, reserved to the states under the Tenth Amendment to the Federal Constitution, rather than upon Article VI, Section 2, the supremacy clause of that same Constitution[14], which defines the "supreme Law of the Land" in federal terms, and which is getting more attention nowadays than the Tenth Amendment in the Bill of Rights.

We all know that federal law has developed greatly in the last twenty-one years. But how puzzled our 1938 delegates would have been if confronted with the *Benanti* decision of 1957! In that case itself the Federal Department of Justice argued unsuccessfully that Section 605, being general, did not affect New York State law.

At any rate a strong effort was made in that 1938 convention to bring about a constitutional ban on law enforcement wiretapping, but this was so strongly and convincingly resisted by the district attorneys of the state that the opposite result was obtained; a constitutional amendment was adopted with bipartisan support (and later ratified by the people) which in effect legalized law enforcement wiretapping, when done under the authority of an *ex parte* court order or warrant.[15] This was later to be implemented by the Legislature in Section 813(a) of the Code of Criminal Procedure.

The popular approval of this amendment doubtless reflected a change in public sentiment. When Holmes, Brandeis, *et al.* spoke of "dirty business" in the *Olmstead* case the prohibition agent was widely regarded as the common enemy and the bootlegger as man's best friend. By 1938 the people had realized that syndicated criminals were the common enemy, as they still are in 1960. Olmstead was a bootlegger.

Thus twenty years ago (paradoxically as a result of resistance against

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10. *People* v. *Hebberd*, 96 Misc. 617, 162 N.Y. S.80, at page 84 (1916).

11. *Olmstead* v. *United States*, 277 U.S. 438 (1928).

12. Harlan F. Stone, as Attorney General earlier in the Coolidge Administration, had ordered wiretapping stopped by the Department of Justice.

13. *Nardone* v. *United States*, 302 U.S. 379 (1937), later reinforced by another *Nardone* decision, 308 U.S. 338 (1939).

14. Article VI, Section 2, of the U.S. Constitution reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding."

15. The 1938 wiretapping amendment is embodied in Article I, Section 12, of the New York State Constitution, which follows up the long-standing "search and seizure" provisions as follows: "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

the anti-wiretap people) New York State attained a rational control over an ugly but necessary weapon against crime, particularly against the organized underworld. This control derived, clearly, from the provision for the dirty business of search warrants in the Fourth Amendment of our Federal Constitution. It produced order in an area in which the police had formerly operated without restraint, as they still do in practically every other state. Regrettably no other state, except Massachusetts in 1959, has followed New York's example in this matter.

If the philosophy of this New York constitutional action was in contrast to the decision in the *Nardone* case, that did not seem remarkable in 1938. Differences between state and federal law have been commonplace. The most notable of these, and very relevant here, is that the federal courts exclude evidence which has been obtained illegally, while the rule in many states, including New York, is precisely to the contrary. The New York rule, that probative evidence is admissible even though obtained illegally, is firmly stated in the *Defore* case[16], an opinion written by Judge Benjamin N. Cardozo before he became a Justice of the Supreme Court.

In the present instance, the contrast between federal and state laws extends to their method of adoption. As we have seen, New York's constitutional provision and its implementing Act were thoroughly and publicly debated, while Section 605 appears not even to have been discussed before the Congress.

Such being the circumstances in which it was passed, it seems to me as a legislator extremely unlikely that the general membership of Congress was aware even of the existence of those few pertinent words tucked away in Section 605. The 73d Congress, the first one of the New Deal, handled vast masses of important legislation; indeed, in 1933 it set precedent by passing emergency banking and currency bills before they were even printed, let alone read. Every legislator knows about the "sleeper", the unobtrusive provision that slips unnoticed into the law. Nevertheless, whatever law is passed and signed by the Executive is therefore the law, and must be so construed.

If Congress was casual and undiligent about passing Section 605, the federal courts have been very active, and the case law interpreting it is vast. The annotations on this section in 47 U. S. C. A. occupy twelve two-column pages of fine print, dealing primarily with the thirty-one words we have quoted. In general they have to do with the inadmissibility of wiretapping evidence in federal courts, rather than with the act of wiretapping itself[17]. This rule has figured in many important cases, notably in the reversal of the conviction in the national security case against Judith Coplon, although the courts noted that she had been clearly proved guilty. It kept Frank Costello out of jail for many years.

In the two *Nardone* cases, already cited, the Supreme Court held that evidence obtained from wiretapping by federal agents was inadmissible in a federal court. In contrast to this, the Supreme Court held, in *Schwartz* v. *Texas*, 344 U. S. 199 (1952), that the same type of evidence was admissible in a state court where it had been obtained by state agents. "The rationale of that case", as Chief Justice Warren was to remark in the *Benanti* decision, "is that despite the plain prohibition of Section 605, due regard to federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect." Such has been the uneasy balance between the states and the nation in this matter.

In contrast to the many rulings on the admissibility of evidence, the annotations on Section 605 make only one reference to a prosecution and conviction under it, *U. S.* v. *Gris*[18], a case which originated in the investigation by our Joint Legislative Committee. The defendant, Charles V. Gris, was convicted in New York of interception and divulgence and eventually served a thirty-day jail sentence. Later, James R. Hoffa, the teamsters' union boss, was also prosecuted under this section, in New York, and was acquitted. Certainly in our Second Circuit, and elsewhere so far as we are able to determine, these are the only prosecutions ever undertaken under Section 605. I think it is clear to any lawyer that if Congress really intended this section to be a penal protection of the people against wiretappers, Congress was very casual in drafting its law on this complex subject, and the federal authorities have been most lackadaisical about enforcing it.

Such (except for Hoffa) was the background, as of 1957. As we have seen, the *Schwartz* case had established a sort of peaceful co-existence between contrasting laws and philosophies. On December 9, 1957, this atmosphere of quiet was disrupted by the resounding language of Chief Justice Warren, backed by the unanimous Court, reversing the conviction in the *Benanti* case. This stated in no uncertain terms that New York State's system of law enforcement wiretapping was a violation of Section 605 and that Congress, setting out a prohibition in plain terms, did not mean to allow such contradictory laws as New York's.

As if this were not serious enough, the Court cited to support its conclu-

(Continued on page 332)

16. *People* v. *Defore*, 242 N.Y. 13, cert. denied 270 U.S. 657.

17. It is notable that the Supreme Court, despite its many opinions, has never completely defined the offense set forth in Section 605, although it has held that divulgence of a wiretap is a violation.

In the *Benanti* case, to be discussed further herein, Chief Justice Warren appended a footnote (355 U.S. at page 100) as follows:

> Because both an interception and a divulgence are present in this case we need not decide whether both elements are necessary for a violation of Section 605. Also because here the disclosure was of the existence of the communication, it is not necessary for us to reach the issue whether Section 605 is violated by an interception of the communication and a divulgence of its fruits without divulging the existence, contents, etc. of the communication.

Various attorneys general have held (as does the N. Y. Court of Appeals) that both elements are necessary. It is clear that in the past the F.B.I. has used wiretapping, as distinguished from "divulgence", in criminal investigation. It would be impossible to state whether this be current practice, since divulgence of the existence of a wiretap has been declared a crime. If this be sophistry, make the most of it.

18. *U. S.* v. *Gris*, conviction affirmed, 247 F. 2d 860 (1957).

Our Joint Legislative Committee, in 1955, received evidence in several cases concerning the eavesdropping specialist, Charles V. Gris. The United States Attorney set precedent by prosecuting one of these successfully.

The private detective license of Gris was revoked, but he continued operating in association with one Foster, who had a license. When Gris emerged from federal jail after serving his thirty-day sentence in 1958, he faced an indictment in New York County in another case, involving eavesdropping by secret microphone. Soon thereafter Gris committed suicide. Foster, with two assistants, pleaded guilty and is serving a one-year sentence. Grim as was the end of Gris, we were gratified by the prompt and effective prosecution of Foster et al., the first under our 1957 eavesdropping law.

The Venal Tongue: Lawyers and the Medieval Satirists

The lawyer of the Middle Ages, at least so far as the satirists of the time saw him, was combative, irresponsible, unfaithful to his clients and, above all, venal. Professor Yunck's study of the opinion that laymen had of the lawyer in those days indicates that the Bar's public relations were at an all-time low.

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THE ROAD TO respectability has been arduous for many professions. Today's celebrities of stage, screen and television were in the Middle Ages the "lowsy jogelours" mentioned by Chaucer, frowned on by the Church and supported by the nobility as mere beggars and hangers-on. Today's eminently respectable banker was in the Middle Ages one of the hated tribe of usurers, and medieval legend was full of tales of dying usurers fetched off to hell—sometimes both body and soul—by packs of yelling fiends. The medieval lawyer, too, had his problems in public relations, though they were not so severe as those of the medieval entertainer or banker. As the lawyer was a learned man he shared with the clergy some of the reverence—reverence which bordered on superstition—which was widely felt for all literacy. Yet he was generally unloved. It may be amusing, or even chastening, to review the lay image of the lawyer drawn by the medieval satirists in the infancy of the profession, and to suggest why it acquired its specific unpleasant form.

Law had been a distinguished pursuit during the days of the Roman Republic, though it was then hardly a profession which required the specialist's technical knowledge. Scientific jurisprudence did not reach the astonishing peak of its development until the late Empire, in codifications like those of Justinian. But all went down to destruction before the hordes from the north, and by the seventh century the lawyer and jurisprudence itself had disappeared from what remained of civilization. The abstract or universal concept of law was replaced for some centuries by the more personal, limited and makeshift idea of feudal or manorial custom and tradition.

The revival of the study of law in Western Europe and the reappearance of the lawyer took place in the twelfth century with the renewed study of Roman and canon law.[1] The study of canon law developed first, brought about largely by the exigencies of the investiture struggle and by the growing complexity of ecclesiastical organization. It is not surprising that the Church, whose organization was incomparably the most complex of medieval European society, should produce the first lawyers of medieval Europe. Well before the end of the twelfth century the Roman Curia had cardinals especially trained in canon law to act as *auditores* of cases and as standing counsel. The study of canon law was immensely aided when Gratian, a monk of Bologna, compiled his *Concord of Discordant Canons*, better known as the *Decretum* (*ca.* 1140), which helped reduce the chaotic ecclesiastical laws to the beginnings of order. Twelfth century literary references to lawyers are almost always to specialists in the canon law.

The profession of civil law developed somewhat later, though the renewed study of Roman law began also in the twelfth century, under the influence of the great law school at Bologna, and of the jurist Irnarius (*ca.* 1060-*ca.* 1130). The study, though at first (like all learned disciplines of the Middle Ages) conducted by and for the clergy, was revolutionary in producing the first large group of learned laymen, who were invaluable when tightening ecclesiastical organization made the clergy less available to the royal courts. "It was a great advantage to European royalty", remarks Haskins, "that, just when the clergy began to fail it, a class of educated laymen began to appear, trained in law as well as letters, from which the expert administrators and agents of the future could be taken. With the growth of bureaucracy even the church leaned more heavily on its lawyers, and it was natural that kings should turn to the lay jurist or legist. For good and ill, the lawyer had come as an active element in the world's government, and he had come to stay."[2]

It is impossible to determine when

1. The interested reader is referred to two excellent brief treatments of the revival of jurisprudence: C. Haskins, THE RENAISSANCE OF THE TWELFTH CENTURY (Cambridge, Mass., 1928; paperback ed., New York, 1957), pages 193-223; and H. Hazeltine, "Roman and Canon Law in the Middle Ages," in THE CAMBRIDGE MEDIEVAL HISTORY (Cambridge, 1911-36, 8 volumes), V, 697-764.

2. Haskins, page 222.

the first civil lawyers made their appearance in the courtroom, but it no doubt depended partly on the introduction of the original writ, probably first used in the twelfth century, but not made compulsory until later. "Written documents in any affairs", says Herbert Cohen, "may require interpreters, and in important matters expert interpreters. Yet we do not know when written pleadings were first introduced; probably they came gradually, and with them, assuredly, specialist composers. But the writ alone, with its long history, would account for the rise of a specialist class; form was the very essence of a writ."[3]

Lawyers—they are called *legistes*, *advocati*, *causidici*, *jurisperiti*, and *juridici* in the Latin literature of the day—were much in demand, and the profession proved popular and lucrative. Twelfth century moralists and satirists complained repeatedly that clerks were forsaking the arts and theology to study law, abandoning learning and religion for lucre. Law and medicine were often bracketed together as shameless roads to quick wealth. A proverbial Latin distich read as follows:[4]

> If you are looking for wealth, be a doctor or a lawyer;
> Grammarians and logicians stay poor and needy.

Some of the satirical poets view the proverbial profits of law and medicine with violent bitterness:[5]

> Many study the law these days, not for justice,
> But because avarice wishes to acquire more goods.
> I beg Christ to confound the jurists;
> They are no psalmists, but the harpists of Satan.
> The lawyer, the doctor, and the whore are always alert;
> If anyone offers them a higher fee, they slip away and follow him.

Parallel passages can be multiplied, all with the same complaint:[6]

> Nowadays no one is worth anything unless he knows how to litigate,
> Unless he knows how to cavil carefully in courtrooms,
> Unless he knows how to beguile the innocent with frauds,
> Unless he knows how to collect heaps of money.

The Moralist's View of Medieval Lawyers

The profit-motive was, as we shall see, the chief target of satire against the lawyers during the twelfth, thirteenth and fourteenth centuries. The moralists and satirists habitually characterize the lawyer as noisy and combative, irresponsible, unfaithful to clients, and above all venal. The medieval moralist was wont to assign characteristic vices to each age and profession; and that of the lawyer was venality, flowing from avarice. Bishop Brinton in the fourteenth century refers to it casually in one of his sermons as a commonly accepted fact: "Since the lawyer is naturally inclined to avarice because of lucre, I advise him never to cast away his good name for temporal goods, 'for good name is better than great riches (Prov. 22).'"[7] Avarice, then, makes the lawyer venal, and venality completely destroys his honor and responsibility. Guiot de Provins, a thirteenth century French satirist, draws a caustic picture of the Bologna lawyers, "jangling more than starlings in a cage", prepared for any deceit, willing to take either side of a question for gain.[8]

The remarks of Peter Cantor, a twelfth century Parisian clerk, and one of the most renowned scriptural exegetes of his day, illustrate well the satirists' view of the lawyer. Peter devotes a whole chapter of one of his books to an essay "Contra advocatos".[9] "There is a type of man similar to the usurer", he says, "and that is the lawyer. For just as the sinner borrows many talents and does not repay them (Psalm XXXVI), so the lawyer receives freely his natural talent from God, the talent of knowledge and grace, and does not repay it freely, but makes his tongue venal..." Hence, he remarks, many lawyers are learned in the service of falsehood against justice, wise to do evil, eloquent to obscure the truth. They twist and distort legal technicalities, protracting litigation for their own profit. For money they have the eyes of Argus, the hands of Briarius, the lies of Laomedon, the cunning of Ulysses. "I have seen incurable illness", he writes, "which no doctor could be found to cure, so that the patient's life was despaired of, but I have never seen a lawsuit so evil and unjust that a lawyer could not be found to take it."

These remarks state the essence of the satirists' view of the lawyer: his turning of God-given talents to profit, his willingness to speak (for pay) for either truth or falsehood, his responsibility for turning legal technicalities to profit and protracting litigation for the same purpose. Similar attacks are plentiful. Thus Alain de Lille gives advice to the new lawyer: "Let him not prostitute his tongue, not expose his speech for sale, not sell the gift of God, not set for hire the free favor of the Lord. Let him not lay out for sale what he has received solely as the gift of grace."[10] Peter of Blois delivers the same message in fiery rhetoric:[11]

> That once venerable name and glorious profession of advocate is now debased by notorious venality, and sells its miserable and abandoned tongue, buys litigation, dissolves legitimate marriages, breaks friendships, revives the ashes of sleeping disputes, violates contracts, calls settlements into question, shatters legal traditions, and in setting its nets and snares for the capture of money destroys all justice... The lawyer should give freely of what he has freely received, should plead for the orphan and widow, for the good of the commonwealth, for the liberty of the Church, demanding nothing, undertaking obligations voluntarily, "delivering the poor from the hand of them that are stronger than he; the needy and the poor from them that strip him" (Psalm XXXIV).

This, then is the ugly picture of the lawyer drawn in the moral treatises of the Middle Ages, uttered by preachers from the pulpit, and elaborated by numerous satirical poets. Irresponsibility

3. H. Cohen, A HISTORY OF THE ENGLISH BAR AND ATTORNATUS (London, 1929), page 112.
4. J. Werner, ed., LATEINISCHE SPRICHWOERTER UND SINNSPRUCHE DES MITTELALTERS (Heidelberg, 1912), page 29.
5. I. Zingerle, *Bericht über die Sterzinger Miscellaneen-Handschrift*, WIENER SITZUNGSBERICHTE, LIV (1866), 310.
6. T. Wright, ed., THE POLITICAL SONGS OF ENGLAND (Camden Society, London, 1839), page 47.
7. THE SERMONS OF THOMAS BRINTON, BISHOP OF ROCHESTER, ed. M. Devlin (2 vols., Camden Society, London, 1954), I. 168.
8. Guiot de Provins, CEUVRES, ed. J. Orr (Manchester, 1915), pages 85-86.
9. Petrus Cantor, VERBUM ABBREVIATUM, li; in Migne, PATROLOGIA LATINA, CCV, 159-161.
10. Alanus de Insulis, *Summa de arte praedicatoria*, xii; in Migne, *Patrologia Latina*, CCX, 187.
11. Petrus Blessensis, *Epistolae*; in Migne, *Patrologia Latina*, CCVII, 91-92.

in the service of money is its essence. The venal tongue becomes the very symbol of the lawyer, and is the subject of a number of short moral-satirical tales—*exempla*—concerning the horrible fate of lawyers after death. Jacques de Vitry, for example, tells of the lawyer who during his life had "afflicted many unjustly with his venal tongue", and who in death stuck out his black tongue, so that it could not be hidden, as a sign of great opprobrium.[12] Caesarius of Heisterbach tells of another who in death was found to have no tongue. "And he deserved to lose his tongue when he died", remarked a priest, "for he had often sold it when alive."[13] The fourteenth century English friar, John Bromyard, tells of the lawyer who after death appeared to one of his friends, tortured by fiery horses, cattle and other animals in his mouth, which had become immense. He explained that he had gained those animals wrongfully through his speech, and was now fittingly punished. Bromyard concludes with a distich on the subject:[14]

> Oh you lawyers who sell your tongues,
> Hell calls you, the heavenly order spurns you.

The theme of the venal tongue not unnaturally invited comparisons with the prostitute, as we have seen in one of the verses already quoted. The comparison is frequent, but nowhere so cleverly developed as in the book of *Lamentations* by the thirteenth century French satirical poet, Matheolus. Matheolus proposes to show that the lawyer is *worse* than the prostitute:[15]

> What shall I say of the lawyers?
> I will not lie about them for fear:
> They have more disgrace among them
> Than has a shameful, foolish woman.
> Each of them trades on his instruments:
> The woman rents her *cul* for pennies,
> And the advocate sells his tongue.
> The tongue is a more precious member
> Than is the *cul*; of that I'm sure;
> And the sale is thus the more shameful
> As the tongue is the more precious.

Beyond this, Matheolus makes the usual comments. For love of money the lawyer will represent a stranger against his own father, for the size of the fee determines his relationship to a client. For money he will unsheathe his violent tongue like a sword, and he jousts brilliantly with it until his client's money is gone. Then he loses interest in the case.

Lawyers Compared with Judas

Other writers add significant details to the picture. Bromyard, among others, does not hesitate to ally the lawyer who defends evil for money with Judas himself, "for he who sells the truth for money sells Christ, who is Truth". Bromyard's other comments are like those we have heard before: The venal lawyer's sharp tongue, like the thief's knife, cuts the purses of many men. Such lawyers are the merchants of the devil, his companions in lucre, and fit to be his associates in eternal punishment. They use every possible method to protract cases for their own profit, since brief lawsuits pay them little. The man with no money will never get a decision, and the man with much will wait long. Worse, these advocates are like the wandering stars, for they have a double motion, *pro* and *contra*: "*Pro*, when someone gives them a fee. *Contra*, if the adversary offers them more." They should not begin their processes with the usual formula, "in the name of God, amen", but rather with "in the name of Money, amen." For "in their courts Money rather than God is heard and sped".[16]

In sum, then, the satirists point out that the lawyer, who has received his intelligence and his knowledge as a free gift of God, instead of using that gift freely in the service of truth for Church and Commonwealth and for the relief of God's poor, sells it to the highest bidder, regardless of oaths or loyalty, good or evil. The venal tongue is his most characteristic attribute, his sign and symbol. Since his talent is in a sense the gift of the Holy Spirit, he is as guilty of simony as the bishop who sells ecclesiastical benefices or the venal parson who sells the sacraments. When he defends wrong against right, falsehood against truth, he is guilty with Judas of the sale of Christ Himself. Some lawyers will take money from both sides, and all are active in promoting quarrels, encouraging enmities, and otherwise seeking out excuses for profitable litigation. And all this results from the corrupting power of money, for which the lawyer will do anything.

These charges are (from the modern point of view) of two kinds. One concerns violations of professional ethics, recognized as such today: the searching out and encouraging of litigation, and accepting money from both sides of a case. We cannot tell how widespread these practices were; certainly not as widespread as the moralists and satirists would have us believe. Such writers are after all specialists in the dark side, inquisitors into abuses rather than uses. Yet such malpractice was much more frequent than it could possibly be today. In the infancy of any profession, when no professional code of ethics has been developed, and no governmental or professional organizations have assumed the func-

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12. G. Frenken, Die Exempla des Jacob von Vitry (München, 1914), pages 102-103.
13. Caesarius of Heisterbach, The Dialogue on Miracles, tr. H. Scott and E. Bland (2 vols., London, 1929), II, 275.
14. J. Bromyard, Summa praedicantium (Venice, 1586), "Advocatus", cc. 44-47.
15. *Les lamentations de Matheolus*, ed. A.-G. Van Hamel (Paris, 1892), pages 282-285. The passage is quoted from Jehan LeFevre's fifteenth century French adaptation of the Latin original.
16. *Summa praedicantium*, "Advocatus", cc. 4-32.

tions of the watchdog, such occurrences are bound to be frequent. So they no doubt were in the Middle Ages.

The second group of charges is more striking. The modern reader understands the wrongfulness of violating professional ethics. But according to these charges it seems that the mere practice of law—the simple acceptance of fees for legal counsel—makes the lawyer a venal person, and a sort of simonist. One wonders why the lawyer incurs guilt for the sale of his services when the plowman or plasterer does not. Here the charges give us a good insight into a peculiarity of medieval thinking on certain aspects of the obligations of society. The lawyer was obviously thought different in kind from the merchant, the laborer or the craftsman; he was in fact still considered a sort of clerk, a special servant of the truth of God, as the clergy were of the Church of God. The service expected of him was heroic—and gratis. It is significant that the only other group regularly satirized for their venality were the clergy, from the Papacy down to the least parson. Clerks and lawyers, it appears, were not to profit from their talents.

More specifically, the satire reflects the lay suspicion of the long and complicated processes of the courtroom, the lay hatred of the subtle, the technical, and the obscure. The new science of law, as we have pointed out, brought formalism, technicality, and hence the lawyer into the courtroom; but the non-specialist would not recognize the need for these things. "*A priori*", says Cohen, "we should expect that a visible increase in verbal formalism would beget in the spectator the suspicion that the proceedings were a sort of organized tricks conventionally played by the actors on both sides, that the words used had more weight with the judge than the facts of the case, and, indeed, very early we find that the lay mind took this view..."[17] The strange formalism of the courtroom, where Tongue seemed balanced against Truth, had much to do with the hostility of the satirists. It is curious that the moralists who objected so bitterly to lawyers who pleaded the causes of guilty parties were unconsciously subverting all process of law themselves, assuming the defendant's guilt before the trial. But this passed unnoticed in the heady atmosphere of satire.

The causes of hostility, however, lay deeper than the mere suspicion of legal subtlety. The satire which we have been examining seems clearly to represent, like so much of the satire of all ages, an intensely conservative reaction to social and economic changes not wholly intelligible to those who protested. The medieval idea of the lawyer was a fusion of the ancient Roman ideal with certain medieval Christian elements. The lawyer of Cicero's age was ideally a man of senatorial or equestrian rank —hence of independent wealth—who pleaded cases without thought of fees, choosing to defend or prosecute this man or that, as part of the obligation owed the state by a man who had entered on the steps of public office. The actuality died early; Justinian's codifications recognized the lawfulness of payments to lawyers, and some medieval thinkers were aware of this.[18] But the moralists were suspicious, though the more practical ones like Peter Cantor and Peter of Blois were forced to admit the righteousness of moderate fees. The Ciceronian ideal of public service lingered on in the lay mind, and fused with the concept of the lawyer as Christian clerk and servant of truth. Through his divine gifts of talent and knowledge the lawyer became as it were one of the Lord's anointed, a sort of glorified *amicus curiae*, the custodian of his talents for the common weal, who should have the wealth of a magnate combined with the charity of a friar. Judged by this ideal the lawyer who took fees, who forsook the destitute for the service of the wealthy, was paltry indeed, degraded, even a simonist. This despite the fact that virtually no lawyers were recruited from the feudal nobility, the only class which could afford such a charitable view of legal services.

But the hostility to the lawyer was only one aspect of a broader and deeper conservative protest. By the time the lawyer appeared in the twelfth century the dissolution of feudalism was under way, though most of the medieval thinkers remained feudally minded. Money was slowly becoming the measure of all things, and the moralists and satirists viewed with horror and indignation the rise of an economy beyond their experience and sympathies. Despite his suspicion of the lawyers, medieval man conceived of the universe as a concrete expression of law, both human and divine. When he saw the lawyers and the clergy, the highest representatives of the two laws on which all human relations hinged, subjected to the rule of money, it must have seemed to him as if the foundations of society were crumbling. His natural reaction was to lash out at both lawyers and clergy as simonists, as betrayers of their trusts, as venal opportunists who misused their spiritual gifts and God-given talents.

Such hostilities and blind protests are not unknown today, and there are still those who voice, on occasion, dark suspicions about the profession of law. But today's lawyer may feel comforted to know that he is not being suspected, every time he accepts a fee, of the crime of Judas.

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17. Cohen, page 125.
18. *Cf.*, *e.g.*, John of Salisbury, POLICRATICUS, ed. C. Webb (2 vols., Oxford, 1909), II, 340.

The Blind Goddess Balances Her Scales: The Supreme Court and Internal Security

In this article, Mr. Wham follows the Supreme Court's holdings on subversion from the "clear and present danger" test of the 1920's to the Court's latest pronouncements in the *Barenblatt* and *Palermo* decisions. His research shows that the Court has followed a definite pattern in applying the Constitution in this area.

by Benjamin Wham • ***of the Illinois Bar (Chicago)***

ROMAN MYTHOLOGY depicts justice (Justicia) as a goddess wearing a blindfold and holding scales and perhaps a sword. The scales connote the weighing and balancing of interests—a process which led to Shakespeare's phrase: "even handed justice".

It is a common fallacy that justice is an exact science and can be weighed and measured equally for all. We need hardly disillusion members of the American Bar Association. All experienced lawyers know the illusive quality of justice. This is caused by the necessity of assembling and appraising the facts and applying the law. The real difficulty arises because this must be done by fallible human beings who see the facts and the law through their varying experiences and personalities.

This is especially true as to constitutional questions which come before the United States Supreme Court. It is generally agreed that the Constitution was drafted in general terms so that effect could be given to changing conditions.[1] After John Marshall's Chief Justiceship, it was well established that the Supreme Court not only had authority to interpret the Constitution and to declare laws of Congress unconstitutional but it also assumed authority to change its interpretations of the Constitution.[2]

This authority was extended by the Fourteenth Amendment to the laws and decisions of the states; and more recently, the Court has interpreted the Fourteenth Amendment to incorporate the guarantees of the First Amendment.[3]

Shifts in the Court's opinions have caused an uneasiness from time to time among various groups, for example, those upholding state's rights as opposed to a strong central government, and those upholding civil rights of individuals as opposed to public rights and even national security. One might judge from the anguished outcries at such times that the blind goddess had completely lost control of her scales and that they had become unbalanced and were tipping, tilting and shimmying in a most unladylike manner. It is a matter of common knowledge that because of these varying interpretations certain private groups, as well as the Executive and Congress, have at times attempted to control the Court.[4]

Those provisions which protect the inner life of citizens and the integrity of democratic political processes have brought the greatest amount of litigation to the Supreme Court. These involve the guarantees in the First Amendment of freedom of religion, of speech, of the press, of assemblage and of petition to the government for a redress of grievances.[5]

The Clear and Present Danger Rule

Perhaps the best-known phrase emanating from these cases is the one used by Justice Holmes in the *Schenck*[6] case. There he enunciated the "clear and present danger" rule. In that case, the defendants were convicted of obstructing recruiting during World War I by sending circulars to draftees urging resistance to conscription. The majority of the Court affirmed, but Justices Holmes and Brandeis dissented. However, in his dissent, Holmes said that free speech had its limitations:

> The most stringent protection of free speech would not protect a person in falsely shouting "fire" in a theatre, and causing a panic...

Justice Brandeis agreed with Holmes that "clear and present danger" does not exist if there is time to avert the impending evil by resorting to rational processes.

In later years, the successors of Holmes and Brandeis accepted un-

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1. Example is the sudden shift in 1937 to sustain new deal legislation.

2. *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819); *Marbury* v. *Madison*, discussed in Warren History, I, 194-218; *Brown* v. *Board of Education*, 349 U. S. 294 (1954).

3. Learned Hand, THE BILL OF RIGHTS, page 50 (1958); *Near* v. *Minnesota*, 285 U. S. 697.

4. Examples are the change in interpretation in the child labor and segregation cases; and the court packing bill in 1937.

5. We are indebted to Dumbauld, The Bill of Rights (1957), for much of the historical material herein.

6. *Schenck* v. *U. S.*, 249 U. S. 47 (1919).

reservedly the formula originated by them.

> What finally emerges from the "clear and present danger" cases is a working principle that the substantial evil must be extremely serious and the degree of imminence extremely high before utterance can be punished.[7]

When do the mouthings of agitators cease to be harmless froth and create a "clear and present danger" to established institutions? When do they become an incitement to riot or revolution? These are problems to which no definite and certain answers can be given. However, the province of the Supreme Court is to decide these questions as they arise. "The pragmatic and empirical judgments thus formulated are productive of controversial and sometimes doubtful doctrines."[8]

One of the changing conditions envisioned by the Constitutional Convention arose in this country when the Soviet Union, following its avowed intent to control the world, caused its agents, both foreign and domestic, to work toward that end in this country. This change caused the Court to run into difficulties with the "clear and present danger" rule in cases involving the Communist Party. As was pointed out by the majority opinion in the *Dennis*[9] case, there is a vast difference between the Communist Party and the normal variety of political parties in the United States. Just the year before (1950) the Court had held in the *Douds*[10] case that the First Amendment

> ...required that one be permitted to believe what he will... It does not require that he be permitted to be the keeper of the arsenal.

The *Dennis* case was a turbulent nine-month trial of the leading New York Communists for violation of the Smith Act. At the conclusion of this unsightly spectacle, the trial judge was promoted to the Court of Appeals and the defense attorneys sentenced for contempt of court. The proof showed the formation of a disciplined party organization which systematically taught revolutionary doctrines as formulated in standard Communist textbooks. Apparently, there was no immediate attempt to overthrow existing government in the United States, but the organization was to be in readiness to act at once to seize power whenever circumstances should become favorable. Relations were maintained with Communists in other countries, especially Russia. The jury found that the defendants advocated seizure of power by force and violence as soon as practicable; this was a plan or program of future action, not an academic or philosophical exposition of Marxist views. An important consideration was that the conspiracy constituted a continuing and substantial threat endangering the government.[11]

The Supreme Court affirmed, and thus in 1951 seemed to have established the pattern under which state and national laws for the protection of the national security were generally upheld. Then another shift occurred in the opinions of the Court, particularly in 1956 and thereafter.

There was widespread belief that the opinion in the *Steve Nelson*[12] case nullified all state sedition laws, on the ground that the Smith Act, which prohibits knowingly advocating the overthrow of the United States Government by force and violence, had completely superseded state acts.

The uneasiness was then added to by the decision in the *Watkins*[13] case. This involved a hearing before the House Un-American Activities Committee. Watkins refused to answer questions as to past Communist Party membership of certain persons on the ground of lack of pertinency to the subject under inquiry. The Court held that, upon such objection, the Committee must state for the record the subject under inquiry and the manner in which the questions are pertinent thereto. The Court added that the phrase "un-American activities" was vague and that the evidence failed to show that the question under investigative inquiry was ever made specifically known to the witness.

At about the same time, in the *Jencks*[14] case, the Court held that defendants were entitled to examine reports made to the FBI by government witnesses as to events and activities to which they had testified at the trial. The former practice of submitting government documents to the trial judge for his determination of relevancy and materiality was disapproved.

Moffet Studio

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The Sweezy Case

On the same day in the *Yates*[15] case, the Court reversed convictions of members of the Communist Party of the United States on the ground that they were conspiring to teach and advocate the abstract doctrine of the forcible overthrow of the government "divorced from any effort to instigate action to that end". In the *Sweezy*[16] case, the Court reversed a contempt conviction by the New Hampshire Supreme Court on the ground that the state legislature had not made clear in the authorizing legislation that it desired the information sought by the Attorney General.

In the *Uphaus*[17] case, Uphaus had appealed from affirmance by the New Hampshire Supreme Court of his conviction of contempt of court for refusing, on the grounds of the First

7. *Bridges* v. *California*, 314 U. S. 252 (1941).
8. Footnote 5, page 118.
9. 341 U. S. 494 (1951).
10. *American Communications Association* v. *Douds*, 339 U. S. 382 (1950).
11. Footnote 5, page 120.
12. 350 U. S. 497 (1956).
13. 354 U. S. 178 (1957).
14. 353 U. S. 657 (1957).
15. 354 U. S. 298 (1957).
16. 354 U. S. 234 (1957).
17. 355 U. S. 16 (1957) (first appeal); No. 34 (1959), second appeal.

Amendment, to produce a guest list and certain correspondence with speakers at World Fellowship, Inc., a summer camp in Albany, New Hampshire, of which Uphaus was executive director. The Supreme Court, without hearing the argument, vacated the judgment and remanded the case for further consideration in the light of the *Sweezy* case.

Following this reversal, the New Hampshire Supreme Court reaffirmed its former decision and Uphaus again appealed and the Supreme Court affirmed by a majority of five to four.

The question before the Court was the validity of the order for contempt for refusal to produce a list of guests at World Fellowship, Inc. The appellant vigorously contended that the New Hampshire Subversive Activities Act had been superseded by the Smith Act, under the ruling in the *Steve Nelson* case. The majority held that this was too broad an application of that decision. It said:

> The opinion made clear that a State could proceed with prosecutions for sedition against the State itself.

The appellant also objected on the ground of denial of rights under the due process clause of the Fourteenth Amendment. The majority opinion distinguished the *Uphaus* case from the *Sweezy* case as follows: The academic and political freedoms discussed in *Sweezy* are not present here in the same degree, since the World Fellowship is neither a university nor a political party.

Furthermore, the Court said that, since questions concerning the authority of the Committee to act depend on state law, the Court accepted as controlling the New Hampshire Supreme Court's conclusion.

More important, the majority opinion emphasized the balancing of public interests against private interests and concluded:

> and the governmental interest in self-preservation is sufficiently compelling to subordinate the interest in associational privacy of persons who, at least to the extent of the guest registration statute, made public at the inception the association they now wish to keep private.

On the same date, the Court handed down its decision in *Barenblatt* v. *United States*.[18] This decision was also five to four. This case involved an inquiry by a subcommittee of the House Un-American Activities Committee into a teacher's past or present Communist Party membership. The appellant objected to the right of the subcommittee to inquire into "political" and "religious" beliefs or in the "personal and private affairs" or "associational activities". He declined to answer questions as to whether he was at the moment a member of the Communist Party, and other questions. He had been indicted for such refusals and had been convicted and given a sentence of six months' imprisonment and a fine of $250.

The appellant cited the *Watkins* case, contending that the authority given the Committee by Congress was too vague; and also, relying on *Watkins*, he contended that the questions were not pertinent to the matter under inquiry.

The majority opinion said that the Court could not agree with the contention of vagueness of authority for

> We cannot read it [the authority] in isolation from its long history in the House of Representatives;—which shows beyond doubt that in pursuance of its legislative concerns in the domain of "national security" the House has clothed the Un-American Activities Committee with pervasive authority to investigate Communist activities in this country.

As to the objection of lack of pertinency, the Court distinguished the *Watkins* case and then stated that here pertinency was made to bear "with undisputable clarity".

The Court also distinguished *Yates* in the matter of the "overthrow" of the Government. It held that the strict requirements of a prosecution under the Smith Act are not the measure of the permissible scope of a congressional investigation into overthrow, for of necessity "the investigative process must proceed step by step".

In discussing the First Amendment, the Court said:

> Where First Amendment rights are asserted to bar governmental interrogation, the resolution of the issue always involves a balance by the courts of the competing private and public interests at stake in the particular circumstances shown.

The Court further pointed out that the justification for its exercise of this power, in turn

> rests on the long and widely accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence. This Court . . . has consistently refused to view the Communist Party as an ordinary political party...

Continuing, the Court said that to suggest that the Communist Party

> were just an ordinary political party from the standpoint of national security, is to ask this Court to blind itself to world affairs which have determined the whole course of our national policy since the close of World War II—and to the vast burdens which these conditions have entailed for the entire nation.

Following the decision in the *Jencks* case, Congress adopted Section 3500 of the Criminal Code governing production of government witnesses' pretrial statements for defendant's inspection at trial. This section was construed June 22, 1959, by the Supreme Court in the case of *Palermo* v. *United States of America*.[19] Here the Court held that the Constitution was not involved. The Court approved the practice of having the Government submit statements for the trial judge's *in camera* inspection. The opinion dealt, in particular, with the Act's provisions for the production of summaries of oral statements. It held that the Act does not apply to such summaries, if they show substantial selection of material or if they were prepared after the interview without the aid of complete notes.

It thus appears that while the scales of the blind goddess may at times tip and sway, the Court recognizes the changed conditions caused by the conspiracy; and for that reason, the Court, in the *Barenblatt* case, said, in conclusion:

> We conclude that the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and that, therefore, the provisions of the First Amendment have not been offended.

18. No. 35 (1959).
19. No. 417 (1959).

Personal Injury Recoveries and the Federal Income Tax Law

Since it is well settled that jury verdicts for damages in tort actions are not subject to the federal income tax, the authors argue that a substantial injustice is done when courts refuse to instruct the jury to this effect. They also discuss the question whether the income tax should be taken into consideration in determining the amount of plaintiff's damages resulting from loss of earning capacity.

by Stanley C. Morris and Robert J. Nordstrom

FAMILIAR TO EVERY trial lawyer is Section 104 of the Internal Revenue Code of 1954 which excludes from a taxpayer's gross income "the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness". Since its inclusion in the Code in 1918 it has been used countless times *after* personal injury litigation has been brought by a plaintiff to a successful conclusion to prevent the judgment (or settlement) from being taxed as income. Less familiar, however, is the impact of this section on the actual *trial* of personal injury cases.[1]

Consider these two possibilities:

(1) The basic idea of tort law is to compensate.[2] Juries should determine damages on the evidence in the case and on the charge given by the court; yet, the impact of taxes is so well known that it is at least reasonable to assume that the average juror *may* add to the verdict an amount which he believes (erroneously) to be due for income taxes. Americans know personally the meaning of "take home pay"; they have heard how large salaries are taxed in the 50 per-cent-plus brackets; they have read how large sums of money won on television programs have been cut in two by our income tax laws; in short, we have become a tax-conscious country. Should not the jury be informed that an award is not like other money in that it is "tax-free", thereby preventing the jury from adding to that award for non-existent taxes?

(2) The basic idea of tort law is to compensate. It is for this reason that plaintiff's salary or wage is introduced as evidence of the value of his lost time and (when the injury is permanent) of the value of the decrease in his future earning capacity. Had this person not been injured through the negligence of the defendant, he could have earned that salary or those wages. Tort law seeks to *compensate* him for that loss by giving the injured person the money equivalent of the value of his lost time, past and future. But had plaintiff not been injured, he would have been required to pay taxes on his earnings. Section 104 removes the necessity of paying taxes on the money given him in lieu of those earnings. Should this fact not be introduced in evidence to reduce the "gross income" evidence introduced by plaintiff and thus to *compensate* plaintiff only for his actual loss?

It was not until 1944 that either of these ideas was urged on an American court. In that year both were tried; both failed.[3] But the increasing tax burden made it clear that this was not to be the end of the attempts.[4] The purpose of this article is to examine the recent opinions and the theory on which they rest, with the hope that some of the confusion which lies behind them can be cleared away.

A. Instruction Regarding Tax Status of Recoveries

The first portion of our problem centers around whether the jury can be told (either by instruction or in closing argument) that the plaintiff will not have to pay income tax on the award, thus preventing it from adding an amount which it may erroneously believe is due for taxes. Notice that we do not need to worry about the future of our tax laws or of the plaintiff's exemptions. There is no parade of tax experts as witnesses in the trial of the case and there is no application

1. This article is a digest of Morris, *Should Juries in Personal Injury Cases Be Instructed That Plaintiffs' Recoveries Are Not Income Within the Meaning of Federal Tax Laws?*, 3 DEFENSE L. J. 3 (1958), and Nordstrom, *Income Taxes and Personal Injury Awards*, 19 OHIO ST. L. J. 212 (1958).

2. *Mahoning Valley Railway Co.* v. *DePascale*, 70 Ohio St. 179, 187, 71 N.E. 633 (1904). See also 4 RESTATEMENT, TORTS §924. But see the pointed challenge by Jaffe in his excellent article in 18 LAW & CONTEMP. PROB. 219 (1953).

3. *Crecelius* v. *Gamble-Skogmo, Inc.*, 144 Neb. 394, 13 N.W. 2d 627 (1944); *Stokes* v. *United States*, 144 F. 2d 82 (2d Cir. 1944). See 34 CAN. BAR R. 940 (1950) for a discussion of present law in Great Britain.

4. The present impact of the problem is represented by the fact that over twenty articles have been written on this subject in the last five years. See Nordstrom, *Income Taxes and Personal Injury Awards*, 19 OHIO ST. L. J. 212, 215. See also: Propriety of taking income tax into consideration in fixing damages in personal injury or death action, 63 A.L.R. 2d 1393 (1959); Propriety of taking income tax into consideration in fixing damages for breach of contract, 63 A.L.R. 2d 1433 (1959).

of complicated formulas.[5] All that is involved is an instruction or charge of *two or three sentences* at the close of the trial.

Yet the courts in the majority of American cases have refused even to allow these two or three sentences.[6] On what basis can such an approach be justified?

If we are to believe the words of most opinions, these sentences are refused because the court has confused the problem of this section of this article with that of the introduction of evidence.[7] In a recent Indiana case the defendant requested such a charge but was told by the state supreme court that it was improper because it involved "intricate instructions on tax and non-tax liabilities with all the regulations pertinent thereto. No court could, with any certainty, properly instruct a jury without a tax expert at its side..."[8] Here is our confusion. The charge is not "intricate" and the judge does not even have to mention the regulations. Certainly a tax expert is not needed. All that is required are those two or three sentences.

However, some courts have tried more carefully to isolate the problem. Those that even then refuse the instruction have assigned three principal reasons:

(1) It introduces "extraneous" matters.[9]

(2) It is "cautionary" in nature.[10]

(3) It assumes that, but for it, the jury would award damages which did not follow the general measure of damages.[11]

A brief look at each of these is necessary:

(1) *It introduces extraneous matters.* As already mentioned, Americans are a tax-conscious group of people. It is not unreasonable to believe that they take their beliefs into the jury room. Indeed, the standard textbook on evidence states that the jury should draw on its common knowledge.[12] When it does search that knowledge, what can it find except the knowledge that taxes take 50 per cent or more of any large sum of money received in any one year? How can it rightly be said that an instruction which correctly states the law can be "extraneous" or "not pertinent"? The Missouri Supreme Court said: "Surely, the plaintiff has no right to receive an enhanced award due to a possible and, we think, probable misconception on the part of a jury that the amount allowed by it will be reduced by income taxes."[13]

(2) *Such an instruction is cautionary in nature.* It is hard to state the origin of the notion that cautionary instructions should not be given to a jury. It was probably based on the idea that if we begin telling a jury what it should not do, then there is no logical ending point. However, as a matter of fact, cautionary instructions may be either positive or negative in form and are commonly given. We have studied two compilations of instructions: *California Jury Instructions*, Civil (1938), and Randall, *Instructions to Juries* (1922).

To determine the exact proportion of cautionary instructions among those approved, a simple numerical count of the instructions which are, in whole or in important part, cautionary has been made. In making this count, where doubt existed as to whether cautionary elements were present to a substantial degree, such instructions were not included among those listed as cautionary. The count thus made showed that there were present in these treatises cautionary instructions in the following numbers:

	TOTAL INST.	CAUTIONARY INST.
California Jury Instructions, Civil	230	143
Randall, Instructions to Juries	7271	2851

It thus appears that cautionary instructions have an important place in our jurisprudence. Numbered among them are some of the most indispensable to the fair and just handling of jury cases. For courts summarily to reject any and every instruction of a cautionary nature would be, in innumerable instances, to deprive juries of highly necessary information and direction. It certainly is no reason to refuse the instruction under consideration in this portion of this article.

(3) *It must be assumed that the jury will follow the general instructions on damages; thus this one is not needed.* This is the principal reason given by *Hall* v. *Chicago & Northwestern Railway Company*[14] the leading case denying the right of the defendant's counsel to comment on the effect of Section 104 of the Internal Revenue Code. The position of this court (Illinois) is that it must assume that juries will follow its charge on the elements of damage; having followed that, there is no need to go further and caution those juries. Carried to its logical extreme, this reasoning reduces itself to an absurdity. All we would need to do is to tell a jury to reach a "just" verdict and assume that it will do so. This we gave up some time ago for we recognized that the definition of "just" varies and thus must be spelled out on the basis of the facts of the case.

This is the crux of the problem. Can we assume that the jury will follow the general charge and leave behind its common knowledge of tax impact? Or is it more logical to believe that taxes are so commonly known that it becomes necessary to caution the members of the jury that the money given in this case is "different" in that it is probably the only example they will ever know of non-taxed dollars?[15]

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5. The existence of these factors may be the justification for failure to introduce evidence of liability. See Section B, *infra*.

6. *Refusing to allow instructions: Behringer* v. *State Farm Mutual Auto Ins. Co.*, 6 Wis. 2d 595, 95 N.W. 2d 249 (1959) (not prejudicial error to refuse the instruction but case does not preclude giving of the instruction); *Louisville & Nashville Railroad Company* v. *Mattingly* (Ky. Ct. of App.) 318 S.W. 2d 844 (1958); *New York Central Railroad Company* v. *Delich*, 252 F. 2d 522 (6th Cir. 1958); *Briggs* v. *Great Western Railway Co.*, 248 Minn. 418, 80 N.W. 2d 625 (1957); *Missouri-Kansas-Texas Railroad Co.* v. *McFerrin*, 291 S.W. 2d 931 (Tex. 1956); *Maus* v. *The New York, Chicago & St. Louis RR. Co.*, 165 Ohio St. 281, 135 N.E. 2d (1956); *Highshew* v. *Kushto*, 235 Ind. 505, 134 N.E. 2d 555 (1956); *Mitchell* v. *Emblade*, 80 Ariz. 398, 298 P. 2d 1034 (1956) (pain and suffering), modified on other grounds, 81 Ariz. 121, 301 P. 2d 1032 (1956); *Atlantic Coast Line* v. *Brown*, 93 Ga. App. 805, 92 S.E. 2d 874 (1956); *Atherly* v. *MacDonald, Young & Nelson, Inc.*, 142 Cal. App. 2d 575, 298 P. 2d 700 (1956); *Hall* v. *Chicago & North Western Ry. Co.*, 5 Ill. 2d 135, 125 N.E. 2d 77 (1955) (comment to jury by counsel); *Combs* v. *Chicago, St. Paul, Minn. and Omaha Ry. Co.*, 135 F. Supp. 750 (N.D. Iowa 1955)

Allowing the instruction: Dempsey v. *Thompson*, 363 Mo. 339, 251 S.W. 2d 42 (1952) overruling *Hilton* v. *Thompson*, 360 Mo. 177, 227 S.W. 2d 675 (1950); *Atherly* case, *supra*, where court indicated that "even though it would have been proper to give the proffered instruction, it was not reversible error to fail to do so".

7. *Hall* v. *Chicago & Northwestern Railway Company*, 5 Ill. 2d 135, 125 N.E. 2d 77 (1955) and discussion in Section B of this article.

8. *Highshew* v. *Kushto*, 235 Ind. 505, 134 N.W. 2d 555 (1956).

9. *Hall* case, *supra*, note 7; *Mitchell* v. *Emblade*, 80 Ariz. 398, 298 P. 2d 1034 (1956).

10. *Combs* v. *Chicago, St. Paul, Minn. & Omaha Ry. Co.*, 135 F. Supp. 750 (1955).

11. *Hall* case, *supra*, note 7.

12. 9 WIGMORE ON EVIDENCE, §2590 (1940).

13. *Dempsey* v. *Thompson*, 363 Mo. 339, 346, 251 S.W. 2d 42, 45 (1952).

14. *Hall* case, *supra*, note 7.

15. This is the approach of *Dempsey* v. *Thompson*, *supra*, Note 13.

On this question a 1955 Illinois case is interesting.[16] At the first trial the plaintiff received a verdict of $130,000. A new trial was granted and the plaintiff then received $80,000, the court having charged this time that any award given plaintiff was not subject to income taxes. Pending the appeal of this second trial, the Illinois Supreme Court decided the *Hall* case.[17] The Appellate Court distinguished the *Hall* case but reversed the lower court on the theory that the instruction possibly entered into the jury's award, thus harming the plaintiff. It is, however, equally possible that the first jury added $50,000 to what it believed to be the plaintiff's real damages in the belief that this amount was needed for income taxes.

If, then, our real problem centers on the court's duty to assure that the income tax free status of the plaintiff's possible monetary recovery is dealt with in a manner fair to both parties, it is believed that the English language is both broad enough and precise enough to tell the jury not to add an amount for these non-existent taxes and still not prejudice the plaintiff by causing the jury to reduce the amount to which he is entitled under the general rule of damages. That instruction may take this form:

> I charge you as a matter of law that any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of the federal (or state) income tax law. Should you find that plaintiff is entitled to an award of damages, then you are to follow the instructions already given by this court in measuring those damages and in no event should you either add to or subtract from that award on account of federal (or state) income taxes.

This much is clear: if an attorney seeks to have such an instruction given at the close of the trial in a personal injury case, that instruction should be carefully framed. It should be framed carefully, keeping in mind that the basic problem here is that of assuring the reviewing court that no harm has resulted to the plaintiff by decreasing the verdict to which he otherwise would be entitled.[18]

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B. Evidence of Lack of Income Tax Liability

In the last section our question centered around the relatively simple matter of an instruction that required no understanding of the future of our tax laws. Here, though, our problem shifts as we are concerned with determining whether evidence of the plaintiff's income tax liability on earnings (past and future) should be admitted by the trial court.

Most American courts have held that the evidence of the taxes that plaintiff was paying prior to his injuries and of the taxes that he would probably have to pay in the future is not admissible.[19] Their reasons are far from clear. Nevertheless, it would appear that the following are most often in the minds of the judges when they refuse the evidence:

(1) *The amount of federal income taxes is too conjectural to be considered by the jury.* This was the reason assigned by the first American case on the subject, when Judge Frank thought he could settle the problem by the use of five words: "... such deductions are too conjectural".[20] Nearly every case since 1944 has echoed these words.[21]

But where is this conjecture? It is not found in the amount awarded plaintiff to compensate him for pain and suffering or for his medical and hospital expenses. There is no conjecture here because these expenses would not have occurred except for the in-

16. *Wagner* v. *Illinois Central Railroad Co.*, 7 Ill. App. 445, 129 N.E. 2d 771 (1955).

17. See citation in note 7.

18. See *Behringer* v. *State Farm Mutual Auto Ins. Co.*, 6 Wis. 2d 595, 95 N.W. 2d 249 (1959); *Maus* v. *The New York, Chicago & St. Louis Railroad Co.*, 165 Ohio St. 281, 135 N.E. 2d 253 (1956); *Bowyer* v. *Te-Co., Inc.* (Mo. 1958) 310 S.W. 2d 892.

19. *Refusing to allow evidence of income tax:* *Hoge* v. *Anderson*, 200 Va. 364, 106 S.E. 2d 121 (1958); *Briggs* v. *Chicago Great Western Railway Company*, 248 Minn. 418, 80 N.W. 2d 625 (1957) (dictum); *Hall* v. *Chicago & North Western Ry. Co.*, 5 Ill. 2d 135, 125 N.E. 2d 77 (1955); *Leming* v. *Oil Fields Trucking Co.*, 44 Cal. 2d 343, 282 P. 2d 23 (1955) (dictum); *Texas & N.O.R. Co.* v. *Pool*, 263 S.W. 2d 582 (Texas Civ. App. 1953); *Pfister* v. *City of Cleveland*, 96 Ohio App. 185, 113 N.E. 2d 366 (1953) (dictum); *Dempsey* v. *Thompson*, 363 Mo. 339, 251 S.W. 2d 42 (1952); *Smith* v. *Pennsylvania Railroad Co.*, 59 Ohio L. Abs. 282, 99 N.E. 2d 501 (1950); *Stokes* v. *United States*, 144 F. 2d 82 (2d Cir. 1944); *Combs* v. *Chicago, St. Paul, Minn. and Omaha Ry. Co.*, 135 F. Supp. 750 (N.D. Iowa 1955) (dictum); *Runnels* v. *City of Douglas, Alaska*, 124 F. Supp. 657 (D. Alaska 1954); *O'Donnell* v. *Great Northern Ry. Co.*, 109 F. Supp. 590 (N.D. Cal. 1951); *Chicago & N. W. Ry. Co.* v. *Curl*, 178 F. 2d 497 (8th Cir. 1949).

Allowing such evidence to be introduced: *Floyd* v. *Fruit Industries*, 144 Conn. 659, 136 A. 2d 918 (1957); *British Transport Commission* v. *Gourley* (1955) 3 All E.R. 796; *Southern Pac. Co.* v. *Guthrie*, 180 F. 2d 295 (9th Cir. 1949), but see discussion in 186 F. 2d 926 (1951); *Armentrout* v. *Virginian Ry. Co.*, 72 F. Supp. 997 (S.D. W. Va., 1947) *revd. on other grounds*, 166 F. 2d 400 (4th Cir. 1948). See also *De Vito* v. *United Air Lines, Inc.*, 98 F. Supp. 88, 98 (E.D. N. Y. 1951); *Wetherbee* v. *Elgin, Joliet & Eastern Ry. Co.*, 191 F. 2d 302 (7th Cir. 1951).

20. *Stokes* v. *United States*, 144 F. 2d 82, 87 (2d Cir. 1944).

21. *Briggs* v. *Chicago Great Western Railway Company*, 248 Minn. 418, 80 N.W. 2d 625 (1957); *Dempsey* v. *Thompson*, 363 Mo. 339, 251 S.W. 2d 42 (1952); *Smith* v. *Pennsylvania RR.*, 59 Ohio L. Abs. 282, 99 N.E. 2d 501 (1950).

jury. Nor is there the least bit of conjecture as to what the tax would have been on the income that he would have earned prior to the trial. Indeed, the *only* conjecture here can be whether the plaintiff would have earned that income—and this the *plaintiff* must prove. Once the income is determined, the taxes that would have been due can be computed with the same exactness as though a regular tax return were being filed by the plaintiff. Conjecture must, therefore, be limited to the recovery for the injury to plaintiff's future earning capacity.

No one would deny that an element of conjecture enters these cases. The number of the plaintiff's exemptions may change, the tax laws may be amended and the plaintiff's income may fluctuate. All these have a bearing on the income tax that he must pay and no one can say today for certain what they will be in the future. But are they more speculative than the things plaintiff must prove in order to receive a verdict? The very existence of plaintiff's salary during this future period is "speculative"; yet we do not stop him from trying to show its continuance. Some courts even let him show that he might have earned an increased income.[22] Is this less speculative than the continuing existence of an income tax along the pattern we now have? A recent Connecticut case has answered this question thus:

> ... The factor in question [evidence of income taxes] is no more uncertain, speculative or conjectural than many of the other factors which must be, and in this case were, submitted to the consideration of the jury... The offsetting factor of the probable income taxes on the probable net earnings should, in a proper case, be called to the attention of the jury...[23]

(2) *The impact of income taxes is a matter between the plaintiff and the government.* Here is the notion that if "the jury were to mitigate the damages of the plaintiff by reason of the income tax exemption accorded him, then the very Congressional intent of the income tax law to give an injured party a tax benefit would be nullified".[24] This is a close cousin to the more familiar collateral source doctrine that allows a plaintiff to recover even though his bills or wages were paid by an outside source, the courts saying that this is "collateral" to the defendant and cannot be used to his "benefit".[25] But an answer to its use here should rest on these two grounds:

First, it is clear that this was not the intent of Congress when it enacted this section in the Revenue Act of 1918. It was included for one reason: Congress doubted that damages for tort were "income" within the meaning of the Sixteenth Amendment.[26] If the intent to benefit exists, it must be found in the failure of Congress to repeal this section. This is always dubious reasoning.

Second, even though we be fortunate enough to find this intent, it must be remembered that this is a statute which exempts the *award* from taxation. Such a statute has nothing to do with determining the elements that should be considered in measuring the award. It merely says that the award, once properly determined, is not to be subjected to income taxes.

(3) *What the plaintiff does with his award is "of no concern to the court".*[27] This certainly has been the theory of tort recoveries in this country. Once plaintiff has his award he may spend it, invest it, or give it away. Again, however, this statement assumes that the award has correctly measured the plaintiff's loss. Until it is properly measured, the court is vitally interested and our problem here concerns itself with the measure of that award. Thus, this argument begs the question before the court.

(4) *Taxes are too complicated to be considered in tort actions.* Perhaps this is the real reason why courts have refused evidence of past and future tax liability. The Supreme Court of Indiana made it an express part of its reasoning.[28] It concluded its thoughts with this sentence: "... No court could, with any certainty, properly instruct a jury without a tax expert at its side." It is not denied that taxes may well be complicated and that a court may have to call in an expert to help it solve this problem. But what kind of justice have we when we tell defendants that we cannot help them because to do so would require the services of an expert?

Personal injury plaintiffs today nearly always come to court supported by one or more *experts* in anatomy, surgery, medicine or psychiatry. Where future earnings are involved, they invoke *expert* assistance to show life or work expectancy. *Experts* are also used in some jurisdictions to testify concerning the reduction to present worth of anticipated future earnings. Why the sudden fear of the need for an expert when trying to calculate plaintiff's income tax liability for these anticipated aggregate future earnings? Plaintiff's income tax liability on lost or diminished past earnings is even a simpler problem.

Should the public become convinced that juries are unable to cope with questions in the decision of which they require expert assistance, the jury system is in danger. Given enough of this feeling, legislatures soon provide administrative agencies expert enough to handle the problem.[29] Often the layman is then allowed to represent the parties appearing before these agencies. This we should guard against—not just selfishly but also because lawyers have, by their training, been made sensitive to the meaning of justice and of client responsibility. We are not suggesting that the erroneous handling of the tax question will cause

(Continued on page 328)

22. *Turrietta* v. *Wyche*, 54 N.M. 5, 212 P. 2d 1041 (1949).

23. *Floyd* v. *Fruit Industries*, 144 Conn. 659, 136 A. 2d 918 (1957); *O'Connor* v. *U.S.*, 269 F. 2d 578 (2d Cir. 1959) (Wrongful death case in which the court says it is "wholly unrealistic" to suppose that federal income taxes will be either discontinued or substantially reduced during the years that the deceased "could reasonably have been expected to live". See pages 584-585).

24. *Hall* v. *Chicago & Northwestern Railway Company*, 5 Ill. 2d 135, 151-2, 125 N.E. 2d 77 (1955).

25. 13 A.L.R. 2d 355.

26. H.R. Rep. No. 767, 65th Cong. 2d Sess. 9-10.

27. *Hall* case, *supra*, note 7. See also *Hoge* v. *Anderson*, *supra*, note 19.

28. *Highshew* v. *Kushto*, *supra*, note 8. It is recognized that this case dealt with a requested charge. See Section A of this article. However, as to that kind of case these words can have no meaning. See text to notes 7 and 8. It is believed that language like that cited here represents an attitude that underlies the problem of this Section B. The same could be said of the *Hall* case, *supra*, note 7.

29. See Davis, ADMINISTRATIVE LAW §§3, 4; Marx, *"Motorism" Not "Pedestrianism": Compensation for the Automobile's Victim*, 42 A.B.A.J. 421, 477 (1956); Marx, *A New Approach to Personal Injury Litigation*, 19 OHIO ST. L. J. 278 (1958); Greene, *Must We Discard Our Law of Negligence in Personal Injury Cases?* 19 OHIO ST. L. J. 290 (1958). Saskatchewan has provided for compulsory insurance and for awards by a state commission for every person injured by an automobile, regardless of the question of fault. Automobile Accident Insurance Act of 1952, Sask. Stat. (1952) Ch. 23, as amended Sask. Stat. (1952) Ch. 18. See Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 234 (1953).

Chief Justice Doe and Chief Justice Vanderbilt: A Comparison in the Techniques of Reform

Mr. Reid discusses the different methods used by two great American judges in securing judicial reform: the late Arthur T. Vanderbilt, of New Jersey, and Charles Doe, Chief Justice of New Hampshire from 1876 to 1896. Mr. Reid's article manages also to depict two strong, colorful personalities.

by John Reid • ***of the New Hampshire Bar (Dover)***

IN AN ADDRESS entitled "Judges as Leaders in Improving the Administration of Justice" delivered in 1952, Judge Harold Medina listed fourteen jurists who he feels have contributed most to the reform of our judicial system.[1] The only nineteenth century figure he named was Charles Doe, Associate Justice of the New Hampshire Supreme Judicial Court from 1859 to 1874 and Chief Justice of the State Supreme Court from 1876 to 1896. Another judge included by Medina was Arthur Vanderbilt, Dean of New York University Law School from 1943 to 1948 and Chief Justice of New Jersey from 1948 to 1957. Doe and Vanderbilt were by far the most remarkable and successful of the fourteen mentioned. While the other twelve concerned themselves with one or more narrow matters in need of improvement, these two men boldly ranged over the whole area of the law, tackling every shortcoming they encountered and almost unassisted reformed the entire judicial systems of their respective states. They sought the same ultimate objective—the swift and unhampered dispensation of justice—but the methods which they utilized to obtain this objective are in striking contrast and offer a unique opportunity to examine two divergent schools of legal reform and to study the challenges faced by the law in different eras separated by half a century of changing custom within the organized Bar.

The different methods utilized by Doe and Vanderbilt were connoted by Medina when he said of Doe:

> There can scarcely be a single Harvard Law School man here who has not heard of the great Chief Justice commonly known as "C. Doe of New Hampshire." He died as long ago as 1896, but he had the fire and he had the learning and the practical common sense which made him, wholly without aid from the Legislature of New Hampshire, the great leader in the improvement of the administration of justice in that state. Full of whimsies and sometimes as eccentric as a March Hare, he was imbued with the spirit of justice and fought for it all his life, fought for it in the hard, practical, matter-of-fact way that one would expect from a native of New Hampshire.[2]

This was the essence of Judge Doe—direct and unpredictable, fighting a lone battle against the forces of reaction without asking the aid of a single human being. Vanderbilt, too, fought a lone battle, but of a different type, for he lived in the age of the organization man and he appealed to the people in a manner unknown to Doe. As Medina said, he

> . . . almost singlehanded sought and obtained the support of the public and put into effect in New Jersey the most comprehensive and most efficient integrated court system now functioning in the United States . . .[3]

Despite the fact they were separated by more than half a century, Doe and Vanderbilt shared one experience in common which helps to explain their zeal for reform. Both began their careers in jurisdictions where the law was enmeshed in the science of special pleading; that labyrinth of technicalities which Doe called "useless and barren questions"[4] and Vanderbilt referred to as "intricate nonsense".[5] When Doe became a judge in 1859 the only modification of the ancient rules in New Hampshire was a statute which allowed the defendant to annex to a plea of the general issue a brief statement of defense in lieu of a special plea. "Half the labor of the Bar", one of Doe's biographers has remarked, "was bestowed upon questions of pleading, and the lawyer who mistook his form of action sometimes lost his case from that cause alone. The merits of the case were often wholly lost sight of and never brought to trial."[6] The same was true in New Jersey when

1. The speech is reprinted in Medina, *Judges as Leaders in Improving the Administration of Justice*, 36 J. AM. JUD. SOC. 6 (1952). The fourteen judges are Charles Doe (New Hampshire), James M. Douglas (Missouri), Arthur T. Vanderbilt (New Jersey), John J. Parker (North Carolina), Charles E. Clark (Connecticut), Bolitha J. Laws (District of Columbia), Ira W. Jayne (Michigan), Homer G. Powell (Ohio), John C. Knox (New York), David W. Peck (New York), Edward W. Hudgins (Virginia), and Robert von Moschzisker, John W. Kephart and Thomas D. Finletter of Pennsylvania.
2. *Id.* at 8.
3. *Id.*
4. *McDuffee* v. *P. & R. Railroad*, 52 N. H. 430, 459 (1873).
5. Vanderbilt, THE CHALLENGE OF LAW REFORM 40 (1955).
6. Eastman, *Chief-Justice Charles Doe*, 9 GREEN BAG 245, 246 (1897).

Vanderbilt first hung out his shingle. Procedural practice there was governed by special pleading until 1912. It was to the destruction of this "intricate nonsense" that Doe and Vanderbilt dedicated their lives.

The Reforms

Vanderbilt thought the early judges who had introduced special pleading to America proved the old adage that a little learning is dangerous. "In their desire to ape all things English and to follow the niceties of English procedure", he said, "they ran counter to popular feeling that this was not justice. Their actions led to statutes altering procedure and incorporating reforms, thus paving the way for the legislature to take over the control of procedure."[7] This broad and general statement of historical fact sums up as well as any can the basic difference between Doe and Vanderbilt. It is an explanation of how New Jersey and most other states effected reform, but it is not an explanation of the way New Hampshire did. The "popular feeling" of which Vanderbilt spoke was the weapon which he used, not Doe. After fourteen years of struggling for reform in New Jersey, Vanderbilt (who was not yet a judge) decided "to do what had been done in England . . . to carry the battle to the people and ignore the judges, the lawyers and the politicians".[8] The people responded in 1947 by endorsing a new Constitution which authorized, in broad outline, an integral judicial system and delegated the rule-making power to the Supreme Court. This was Vanderbilt's method of reform—the antithesis of Doe's—to ignore the champions of fogyism, appeal to the people and arouse the legislature. Doe did none of these things, partly because he couldn't. When he began his long series of decisional reforms (as contrasted with Vanderbilt's one clean break with the past) he had no "popular feeling" behind him; no sympathetic legislature to arouse. In fact, in all New Hampshire there was only one voice crying for change—his own.

Vanderbilt's distaste for the "mass of outmoded learning that governed the daily work of the bench and bar for centuries"[9] was equalled only by Doe's distaste for writs and forms created "by clerks 'too much attached to ancient precedents', or by chancellors engaged in enlarging their own jurisdiction upon 'a strained interpretation', and 'false and fictitious suggestions'".[10] It is doubtful if there was ever a presiding judge in American history who demonstrated less sympathy with legal technicalities and niceties than Doe. Early in his judicial career he permitted the conversion of common law writs at *nisi prius*. Although he was at first overruled[11] he persisted in doing so and in 1879 the Supreme Court, bowing to his logic, held that an amendment may be made in any action, at any stage of the proceedings, to prevent injustice and that the form of action may be changed by amendment.[12] Having gained this beachhead Doe, without the aid of statutes, quickly struck down other technicalities which could be used to defeat a writ. He ruled that counts in contract and torts may be joined in a declaration in a single cause of action;[13] that a declaration against a surviving partner as endorser of a note may be amended by the addition of a count against him as individual endorser;[14] that a form of action may be changed by amendment, and the amendment may be made after a plaintiff's verdict without a new trial when the verdict would not be affected by the amendment had it been made before the trial;[15] that in a suit seasonably brought, where the writ had been abated because it contained no declaration, the declaration may be amended after the time when a new action for the same cause would be barred by the statute of limitations;[16] and finally, in an opinion which practically destroyed the few remaining distinctions between the various writs, that if a party is entitled to relief on a writ of error, *certiorari*, *mandamus*, *audita querela*, or prohibition, it is not necessary to inquire which of the forms he should use.[17]

Vanderbilt has singled out Lord Mansfield as a judicial reformer worthy of praise for his abortive attempt to merge law and equity.[18] But Doe may be worthy of even greater praise, for he succeeded where Mansfield failed. Doe ended the New Hampshire practice of dispensing law from one side of the bench and equity from the other by ruling that pleadings in law and pleadings in equity are by amendment mutually convertible[19] and that the meritorious contingencies of a case might require the prosecution of an action at law and a bill in equity in the same cause of action and at the same time.[20] The judicial intrepidities of Mansfield and Doe rank in a class by themselves and more than one observer has marked their similarities:

> Upon this question Judge Doe exhibited a disregard of precedents and a judicial audacity which has been rarely paralleled. Lord Mansfield's plan of obtaining verdicts from juries of merchants and then proceeding to pronounce the custom of merchants thereon, though directly opposite to what the jury had found the custom to be, will always be remembered as one of the most radical, most audacious acts of a common law judge. Scarcely less striking was Judge Doe's novel announcement that the differences between various forms of action were in reality not substantial, but only formal.[21]

Judge Vanderbilt felt the great milestone in the reformation of American procedure was the adoption of the Federal Rules.[22] He considered them an accomplishment which could not have been effected by judicial decision alone. But it is submitted that Doe anticipated the Federal Rules and may have even surpassed them in liberality. By practically destroying the distinctions between the common law forms of actions[23] and between law and

7. Vanderbilt, *op. cit. supra*, note 5, at 44.
8. Vanderbilt, *Brief for a Better Court System*, N. Y. TIMES, May 5, 1957, §6 (Magazine), page 9, column 1.
9. Vanderbilt, *op. cit. supra*, note 5, at 40.
10. *Owen* v. *Weston*, 63 N. H. 599, 601 (1885).
11. *Brown* v. *Leavitt*, 52 N. H. 619 (1873).
12. *Stebbins* v. *Company*, 59 N. H. 143 (1879).
13. *Crawford* v. *Parsons*, 63 N. H. 433 (1885).
14. *Lane* v. *Barron*, 64 N. H. 277 (1886).
15. *Elsher* v. *Hughes*, 60 N. H. 469 (1881); *Merrill* v. *Perkins*, 59 N. H. 343 (1879).
16. *Gagnon* v. *Connor*, 64 N. H. 276 (1886). In this case Doe said it was a question of fact whether justice requires an amendment.
17. *Boody* v. *Watson*, 64 N. H. 162 (1886).
18. Vanderbilt, *op. cit. supra*, note 5, at 38.
19. *Metcalf* v. *Gilmore*, 59 N. H. 417 (1879).
20. *Brooks* v. *Howison*, 63 N. H. 382 (1882).
21. Hening, *Charles Doe*, in 8 Lewis, GREAT AMERICAN LAWYERS 241, 250-251 (1909).
22. Vanderbilt, MEN AND MEASURES IN THE LAW 118, 124-25 (1949); Vanderbilt, *op. cit. supra*, note 5, at 58.
23. In one case Doe said it was not material whether the transaction "came under the technical appellation of payment, accord and satisfaction, or release, or under no particular head usually found in the books." See discussion by Chief Justice Parsons in Parsons, *The President's Address*, 3 PROC. N. HAMP. BAR ASSN. 209, 213 (1912). The case is *Boody* v. *Watson*, 64 N.H. 162, 9 Atl. 794 (1886).

equity he accomplished, in effect, much the same result as Rules 3, 7, 8 and 9. In *Cole* v. *Colburn* he laid down the general principle that "Damages are recouped to avoid a useless multiplication of suits; and a sound rule of set-off cannot be constructed on the mere form of action."[24] He often held that necessary parties might be joined in an action[25] and in *Webster* v. *Hall*[26] he allowed a claimant to interplead even though the overwhelming weight of decisional authority both before and afterwards, has allowed only the stakeholder to do so.

Chief Justice Vanderbilt has expressed admiration for Lord Mansfield's liberal judicial attitude which encouraged the bringing of suits in areas of the law which he wished to reform. "One cannot imagine any other judge of his time who could or would have done so", he said.[27] It might be assumed therefore that he also admired Doe who did much the same thing. The enthusiasm with which Judge Doe continually looked ahead for opportunities of improving and making straight the paths of legal procedure is well shown by a letter to Judge Ladd when both were associate justices.

> Rollinsford, Feb. 22, 1872
>
> Bro. Ladd:
>
> Can you tell me whether there is a case in the Law term, raising the question whether setting aside a verdict as against evidence, is a question of fact or discretion for the judge and Trial Term; or any other question of discretion?
>
> I have some materials that I think I could work into an opinion on the distinction between matter of discretion and matter of law, and should like to swap and get a question of that sort.[28]

This tendency "to look ahead" is easy to praise in theory but is never popular while being practiced. Doe was often criticized for it, not only because such irrelevant research into matters not yet before the court caused serious delays in the drafting of pending opinions, but also because he sometimes despaired of finding the situation he sought and would manufacture it by forcing his material into cases where it was not really pertinent.[29]

"No judge in these days", Vanderbilt once commented, "may hope to rival Mansfield's contribution to the growth of the law, but every judge and every lawyer may learn much from his skill in adapting the law to the needs of the times."[30] Since Vanderbilt was speaking of Mansfield's merger of law merchant with common law he was undoubtedly referring to sociological jurisprudence when he mentioned Mansfield's "skill in adapting the law to the needs of the times". This is something which many judges praise in theory but which only a few such as Doe actually practice. Doe recognized that the common law had to be "necessarily conformable to the progress of society" and often struck down "harsh and repulsive doctrine . . . [which], growing out of social conditions that have ceased, and incompatible with the increase of trade, productive industry, and personal estate, have become obsolete".[31] Doe did not hesitate to overrule principles which he considered were based on superannuated (usually feudal) traditions. "If such methods and rules were properly adopted in England," he said, "they are precedents for contrary methods and rules under opposite conditions."[32]

Judges as Reformers

A basic difference between the reforming attitudes of Doe and Vanderbilt was that Vanderbilt would not trust judges to lead the movement for procedural reform[33] and Doe would trust no one else. Doe's supporters thought him living proof that judges not only could effect reform but would do so better than the legislature. Professor Jeremiah Smith of Harvard said "The result [of Doe's work] is a flexibility of remedies in New Hampshire not surpassed by any of the so-called 'Code States' . . ."[34] Some felt the flexibility which Doe brought to remedial law was even superior to legislative reform since it was "without the rigidity of the hampering statutes. It is all controlled by the court, and all debate as to the meaning of a statute is voided."[35] Vanderbilt has criticized such "piecemeal" reform,[36] but Doe and his contemporaries thought the

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24. 61 N. H. 499, 500 (1881).
25. *Brooks* v. *Howison*, 63 N. H. 382, 388 (1885); *Cole* v. *Gilford*, 63 N. H. 60 (1889); *Chauncy* v. *Insurance Co.*, 60 N. H. 428, 432 (1881).
26. 60 N. H. 7 (1880).
27. Vanderbilt, *op. cit. supra*, note 22, at 9.
28. Hening, *op. cit. supra*, note 21, at 259. The case Doe found was *Fuller* v. *Bailey*, 58 N. H. 71 (1877).
29. "Doe was a profound scholar of the law, probably the greatest jurist ever to sit upon the New Hampshire bench. His one interest was jurisprudence; he was accustomed, year by year, to mull over knotty points of the law and to arrive at conclusions concerning them which had nothing to do with the cases before the court. But, not infrequently in the course of time, a case would come up in which these issues were involved and Doe would astonish everyone by his familiarity with the legal principle involved, as well as by his original and unprecedented solution of the problems presented. By sheer weight of ability, learning and personality he dominated the Court." Richardson, WILLIAM E. CHANDLER: REPUBLICAN 446 (1940).
30. Vanderbilt, *op. cit. supra*, note 22, at 97.
31. *Brooks* v. *Howison*, 63 N. H. 382, 386 (1885).
32. *Smith* v. *Furbish*, 68 N. H. 123, 149-50 (1894). Along the same line Doe's cacoethes for rationalization often led him to question the reasoning behind common law principles, even those he was upholding. Thus in one case he challenged Mansfield's explanation for the rule-making common carriers insurers of goods and suggested a rationale more closely related to current conditions to cover "so extensive a business". *Rixford* v. *Smith*, 52 N. H. 355, 359 (1872).
33. "It may be asked: why do not the judges lead the movement for judicial reform? The answer is twofold. A weak judge is always afraid of where he personally will end up if changes come; when the reformers speak of scraping off the barnacles on the ship of justice, the weak judge is all too often inclined to think that they may be speaking of him rather than of obsolete procedure. The strong judge who has no personal concern about himself often enjoys advantages in the status quo that might be disturbed in any orderly remolding of the judicial system. . . Now and then we find an unusual judge or lawyer who is genuinely concerned with procedural reform, but generally we must expect active opposition from the bench and, at best, inertia from the bar. Increasingly laymen, because of their independent position, have been called on to serve as the catalytic agents of judicial reform." Vanderbilt, *op. cit. supra*, note 22, at 99-100.
34. 9 HARV. L. REV. 534, 535 (1896).
35. Eastman, *op. cit. supra*, note 6, at 246.
36. Vanderbilt, *op. cit. supra*, note 5, at 45-6.

fabricated adiposity of Field's New York Code with its hundreds of amendments was a patchwork far more intractable.

There is something slightly incongruous in the fact that Vanderbilt, who so ardently admired Lord Mansfield's decisional reformations, nevertheless felt "The great name in the history of reform in American procedure is David Dudley Field."[37] Doe considered Field a misguided adventurer who would destroy the historical continuity of the writs of action and thus break the law's link with Mansfield, Coke, Blackstone and the other great names of the past. To Doe a code was more than an innovation (he never feared innovations); it was an untested experiment which could prove highly dangerous, and which was quite unnecessary since other, more familiar, and safer methods were available to effect whatever reforms justice required. In his day the states did not have as a model the example of the Federal Rules with their long string of precedents lending them a high degree of certainty. The success of the court-formulated Federal Rules attenuates Doe's position and makes his procedural reforms fusty or at least less important. But in his time legislature-enacted codes seemed unattractive to New Hampshire since Pomeroy had almost deflowered California's by treating it as merely declaratory of what was already practiced, and Field's own New York Code had been strangled in a labyrinth of amendments. As proof that the Federal Rules are truly flexible Vanderbilt pointed to the fact that in 1947 thirty-six amendments were added to the original eighty-six rules.[38] This would not have impressed Doe.

Vanderbilt also praised the English Judication Acts of 1873 for bringing "order out of chaos".[39] The New Hampshire lawyers of Doe's time, even many who had opposed him, often expressed thanks he had delivered them from that kind of "order". In the very year Doe died a United States circuit judge for the New England circuit pointed with pride to the uncompounded simplicity of Doe's homespun procedure and compared it to the Judicature Acts which, he said, "required the enactment of a mass of orders and rules to an extent unknown to any judicial tribunal with us, an entire code of forms, even more numerous than any which have accumulated in the United States under any common-law system of pleading, practice, and procedure . . ."[40]

One reason Vanderbilt did not think judges capable of effecting positive procedural reform was his belief that common law had become static and that the formulation of new original writs had ceased ("by reason of administrative conservatism").[41] Doe, on the other hand, regarded the common law as a living art. "Necessity and convenience", he said, "create forms of action which may be employed in cases in which they are appropriate remedies."[42] "His imagination was captivated by the idea that if Glanvil could invent *replevin* and the assize of *novel disseisin*, if Rolle could invent ejectment, and the Elizabethan judges *indebitatus assumpsit*, the power to invent new writs by virtue of the famous statute of Edward I still existed today in any common law judge."[43] Acting on the principle that where there's a right there's a remedy,[44] Doe proceeded to create new common law writs whenever he felt the need,[45] even in one highly criticized case where equity would have done just as well.[46]

It would be unfair to leave the impression that Judge Vanderbilt completely despaired of court-initiated reforms, at least in non-procedural matters. He has for example praised Mr. Justice Sutherland, who, when he became tired of waiting for Congress to remove the disability preventing wives from testifying on behalf of their husbands, legislatured the change himself.[47] Judge Doe accomplished much the same thing in New Hampshire with regard to the common law rule barring non-expert witnesses from testifying to their opinions of a person's mental capacity.[48] Doe even went further than Sutherland when he struck down the disability preventing respondents from testifying on their own behalf, for he effected this reform, not in an appellate case, but at *nisi prius*.[49] He grew irritated at continually hearing defense counsel complain that if only their client's lips weren't sealed everything would be explained satisfactorily. One day Doe interrupted such a tale of woe and told the attorney he could put his clients on the stand. The startled lawyer turned to his junior and said, "Well John, we shall have to put the rascals on, and the result will be a conviction."[50]

Another matter which Judge Vanderbilt sought to reform was the scorn of legislation traditional among Anglo-American judges and lawyers. "Our attitude of almost supercilious contempt toward legislation, reflected in the all too often ironic phrase of both the bench and the bar: 'the Legislature in its wisdom,' etc., is in striking contrast to the pride that lawyers take in their briefs and judges in their published opinions. The causes of our distaste for statute law are as obscure as they are unreasonable."[51] While Judge Doe was one of those who mistrusted legislative attempts to establish rules for the court, he agreed with Vanderbilt that in matters of substantive law judges often overstep their power when interpreting statutes. Although he was willing to ignore express statutory language when he felt a literal application would violate the "legislative will",[52] he did believe most judges fail to exercise restraint towards laws they frown upon and that this practice should stop:

(Continued on page 325)

37. *Id.* at 53.
38. *Id.* at 56-7.
39. *Id.* at 38.
40. Putnam, *Annual Address*, 2 PUB. SO. N. HAMP. BAR ASSN. 20, 27 (1899).
41. Vanderbilt, *op. cit. supra*, note 5, at 46.
42. *Walker* v. *Walker*, 63 N. H. 321, 324 (1885).
43. Hening, *op. cit. supra*, note 21, at 260.
44. Doe felt that in vindicating rights each party in a civil case is entitled to such remedy "including form, method, and order of procedure, as justice and convenience require". *Owen* v. *Weston*, 63 N. H. 599, 600 (1885).
45. *Boody* v. *Watson*, 64 N. H. 162 (1886).
46. *Walker* v. *Walker*, 63 N. H. 321 (1885).
47. Vanderbilt, *op. cit. supra*, note 22, at 89-90. The case was *Funk* v. *United States*, 290 U. S. 371, 54 S. Ct. 212, 78 L. ed. 369 (1933).
48. *Broadman* v. *Woodman*, 47 N. H. 120, 140 (1865) (dissenting opinion); *State* v. *Pike*, 49 N. H. 399, 408 (1870) (dissenting opinion). Doe's view was adopted by the full court in *Hardy* v. *Morrill*, 56 N. H. 227 (1875). For discussion, see Reid, *A Speculative Novelty: Judge Doe's Search for Reason in the Law of Evidence*, 39 BOST. U. L. REV. 321 (1959).
49. This is one of the examples which Vanderbilt uses against "piecemeal improvement". It was reformed by statute in England in 1898. Vanderbilt, *op. cit. supra*, note 5, at 45-6. The New Hampshire legislature passed a statute making respondents competent to testify in 1869 but this was after Doe had made the common law rule a dead letter in his court.
50. Smith, MEMOIR OF HON. CHARLES DOE 15-16 (1897); Smith, *Memoir of Charles Doe*, 2 PUB. SO. N. HAMP. BAR ASSN. 125, 137-38 (1899).
51. Vanderbilt, *op. cit. supra*, note 22, at 15.
52. "If it is found, upon competent evidence, that the proviso, or any other clause, taken in its strict, literal sense, would not express, but would defeat, the legislative will, it is to be construed with such liberality as will execute the proved design of the law-making power." *Sargent* v. *Union School-District*, 63 N. H. 528 (1855).

AMERICAN BAR ASSOCIATION

Journal

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EDITORIAL OFFICES

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An Honor and a Duty

It is an honor to belong to the American Bar Association and it has always been so considered. In fact, when the Association was organized no lawyer was eligible for membership who had not been admitted to the Bar for at least five years. This standard has long since been abandoned, but the honor still attaches to membership. Since the adoption of the new Constitution and By-laws at Boston in 1936, we have made every effort to keep the Association representative of the whole Bar of the nation, its membership open to every member of the Bar in good standing.

The best available information from Martindale-Hubbell, Inc., indicates that in 1958 there were 236,088 practicing lawyers in the United States. We started with an Association membership of 289 in 1878. Our growth since then has been steady and on a solid foundation. Consider these figures: in 1911 we had 4,701 members; in 1920, when the JOURNAL began its existence as a monthly, 11,331; in 1936, at Boston, 28,228; in 1947; 40,209; in 1955, 55,101; in 1956, after a vigorous and brilliant effort, 81,385; on January 31, 1960, 95,290. As you see, we are within reach of 100,000. Some day, perhaps, it may be recognized that no lawyer has fully met his professional responsibilities until he is a member of his great national professional organization, the American Bar Association. We need them all.

Every high-minded lawyer recognizes that his professional and public duty is to lose no opportunity to make what contribution he can in the over-all effort of the Bar to improve the processes involved in the administration of justice—that it may be prompt and fair for all, rich and poor, powerful and humble, without fear or favor, within the means of those in need of legal service, whatever their station.

He may accomplish much by his own efforts, but much will always remain, impossible of achievement without the organized Bar. And here none is looked upon with greater favor, none commands greater respect, none speaks whose words carry more weight than our Association. It is the largest, most powerful and most respected organization of lawyers there is. But to maintain its standing and its influence it must constantly grow and expand. It cannot stand still. This means that it must deserve the respect and merit the confidence of all who will stop and listen and learn of its good works.

There are some who are still prone to inquire "Why should I join? What is there in it for me?" That is a selfish point of view, ignoring the obligations that follow admission to the Bar. Yet membership does carry with it many contributions to the welfare and pleasure and professional accomplishment of those who join.

They receive regularly the *American Bar News*, of incomparable value and interest.

They receive pamphlets and bulletins of Sections joined.

They participate actively in the worthy and effective activities of their Association, in which they may join with pride.

They receive each month, be it said by us with some diffidence, the AMERICAN BAR ASSOCIATION JOURNAL.

And, best of all, if they will attend a few successive Association meetings, they will know the joy of convening with an ever-expanding circle of true and close friends, drawn nation-wide from the peerless ranks of the Bar of America.

Some feel they must wait to be invited before moving to acquire membership. All lawyers in good standing are

cordially invited and urged to join with us and lend a hand in our great enterprise. We need them. We want them.

All of us, privileged to be members, must eagerly seize every opportunity to help in every possible way in informing those who still hesitate outside the magic circle of the many advantages of membership and of our great need of their help. When they belong they will take real pride and satisfaction in the realization of their contribution in sustaining the ideals and promoting the good works of their profession.

Editor to Readers

A. J. G. Priest, of the University of Virginia Law School, has called our attention to the following editorial from the Virginia Bar News *for January, 1960. It was written by the editor, Hardy C. Dillard:*

FAREWELL TO THE FIFTIES

As we move into the Sixties it occurs to us that intervals of "time" whether reckoned in minutes, hours, years or decades are just so many tricks fashioned by anthropologists, historians and the makers of clocks and calendars. "Time", being continuous, is no respecter of these little arbitrary jumps. Hence to speak of the Sixties in contrast to the Fifties or Forties is only to indulge a kind of temporal fiction. What happened in the Forties was a product of the Thirties and what may happen in the Sixties will be molded, at least in part, by the events and ideas and moods which dominated the Fifties and indeed all predecessor decades.

Putting this obviously profound thought aside, what can be said, in retrospect, of the departed Fifties? What were the truly significant events in politics, science, the arts and law?

On the world political front we venture the prediction that the engulfment of China by the Communists will be judged the most significant political event of the decade; in science, the launching of the first world satellite; and in the arts—we speak here with diffidence—we wonder if Faulkner's eloquently brief acceptance speech of the Nobel prize may not rank high among the great literary moments of the recent past. At a time when disenchantment was rife and even man's capacity for survival was being doubted, he gave simple yet moving expression to the artist's faith in man's "indomitable spirit" and man's capacity for spiritual growth.

And law? No doubt the segregation cases mark a turning point. Whether, as some think, these cases were only the arrogant and unwise manifestations of a politically minded and power hungry court; or whether, as others think, they represented a wise and statesmanlike reflection of the ideological revolution of the 20th Century; or whether they were neither of these things but only a kind of judicial recognition of changing realities set in the context of a concept of "equality" which has never remained static —no matter what the point of view, they no doubt constitute the single most important series of decisions of the decade.

Turning to quieter matters and specifically to the world of legal scholarship what can be said of the past ten years? The answer emerges pretty clearly. We doubt if any comparable period here or abroad can bear witness to such a remarkable concentration of major published works. Corbin's eagerly awaited eight-volume treatise on *Contracts;* Harper and James' three volume work on *Torts;* Davis' four volume treatise on *Administrative Law;* the final volumes of Scott on *Trusts* and Powell on *Property;* and the imminent publication of Pound's lifetime study on *Jurisprudence,* to mention only the giant treatises—were all brought to fruition during this time. They rank with Williston, Wigmore and Glenn among the great contributions of enduring value to our profession and bespeak the continuing vigor and strength of American legal scholarship. . .

So let it not be said that the Fifties were merely fitful. There is room for good cheer as we move into the Sixties, provided always, of course, we remain humble in spirit; strive to do our best and keep high the ideals of a just social order committed to liberty under law.

Disbarments and Disciplinary Action: The Record for Four Years

On a complaint filed by the Washington State Bar Association, the Supreme Court of the State of Washington in a unanimous decision disbarred an attorney who had embezzled $2,500 from one client and $1,750 from another.

Judge Rosellini added an observation in which Chief Justice Hill concurred and these are excerpts:

> **The state bar is vigorously and vigilantly policing its membership. It recommends disbarment against an errant member; however, it has not as yet recognized what obligations, if any, it has to a victim of defalcation by a lawyer.**
>
> **In 44 American Bar Ass'n Jour. February 1958 "The Client's Security Fund: 'A Debt of Honor Owed by the Profession'" fully states the arguments in favor of a client's security fund.**
>
> **Perhaps the time has arrived when we of the legal profession of this state should recognize our obligation to a client who is a victim of defalcation. [1954 Wash. Dec. page 765]**

The decision was dated October 16, 1959. Before the year ended the Washington State Bar Association established its Clients' Security Fund.

by Reginald Heber Smith • *of the Massachusetts Bar (Boston)*

MARTINDALE-HUBBELL, INC. has compiled its "Fifth Annual Report to the American Bar Association of Disbarments, Suspensions, Resignations, Etc. and Reinstatements" and a copy has been given to the Survey of the Legal Profession.

We now have *complete* figures for the past three years for all states and the District of Columbia. Alaska appears in the detailed table for the second year. Hawaii will appear next year. (For the current period there were no disciplinary actions in our fiftieth state.)

The key figures are summarized in Table II. The number of lawyers for the period ending August 31, 1959, is my own *estimate* based on the 1958 figures to which I added the approximate number of lawyers admitted annually in recent years—10,000—and deducted those who have died during the period—2,813—according to the best obtainable evidence.

As the percentage figure is hard to grasp, it can be expressed as about three disbarments among 10,000 lawyers.

In my article on "Disbarments and Disciplinary Action: The Record for Three Years" printed in the July, 1959, issue of the JOURNAL (Vol. 45, page 689) I made a correlation between disbarment and status in practice.

It is earnestly to be hoped that the American Bar Foundation will undertake two important research jobs:

1. To determine how many disbarments are due to embezzlement and the amount of the defalcations.

2. To correlate disciplinary action with the educational record of those disciplined. Higher educational standards were urged in 1921 by Chief Justice Taft and Mr. Root because they had a profound conviction that better education would produce lawyers of finer character.

There has been some discussion as to whether lawyers should make public the record of disciplinary action. The House of Delegates has approved the principle that disciplinary records are public records. See 80 *A.B.A. Rep.* 470 (1955); 81 *A.B.A. Rep.* 475 (1956).

Banks have decided that concealment of embezzlement does far more injury to banking than does publicity.

The *United States Investor* for August 22, 1959 (Vol. 70, No. 34, page 1) stated:

> If you are interested in banking matters, you must have been following with keen interest the experience of banks with embezzlements and similar forms of inside dishonesty in recent years.
>
> The story has not been kept from the public. The total for all of the banks of the country has been clambering upward for years. The figures for the year 1958 are staggering: The dishonesty losses of banks totalled $8,493,000.

Now turn to the number of embezzlers convicted. It was 299 for the year 1958.

TABLE I

DISCIPLINARY ACTION IN THE LEGAL PROFESSION

JURISDICTION	Sept. 1, 1956-Aug. 31, 1957				Sept. 1, 1957-Aug. 31, 1958				Sept. 1, 1958-Aug. 31, 1959			
	Disbarred	Suspended	Reinstated	Resigned	Disbarred	Suspended	Reinstated	Resigned	Disbarred	Suspended	Reinstated	Resigned
Alabama	3	0	1	0	0	0	2	0	0	0	0	0
Alaska	–	–	–	–	0	0	0	0	0	0	1	0
Arizona	2	0	0	0	0	0	0	0	1	0	0	0
Arkansas	0	0	0	0	1	0	0	0	0	0	0	0
California	3	8	6	5	1	8	3	18	6	12	9	17
Colorado	0	2	2	0	0	0	0	0	1	1	1	0
Connecticut	0	0	0	1	1	1	2	1	0	1	0	3
Delaware	0	0	0	0	0	0	0	0	0	0	0	0
District of Columbia	3	0	0	0	0	3	1	0	3	1	0	0
Florida	3	2	0	0	6	4	2	0	4	7	2	1
Georgia	0	0	0	0	0	0	0	0	0	1	0	0
Idaho	0	0	1	0	0	0	0	0	0	1	0	0
Illinois	3	1	0	0	5	1	0	0	4	1	2	0
Indiana	1	1	0	1	0	0	0	0	0	0	0	1
Iowa	1	0	0	1	0	1	0	0	1	0	1	0
Kansas	2	0	0	3	0	0	0	0	1	0	0	2
Kentucky	1	0	0	0	2	0	0	0	0	0	0	0
Louisiana	0	0	0	0	1	0	0	0	2	1	0	0
Maine	1	0	0	0	0	0	0	2	0	0	0	1
Maryland	0	1	0	0	5	0	1	1	1	3	0	0
Massachusetts	3	1	0	1	0	1	0	0	2	0	0	0
Michigan	0	2	2	0	1	1	0	0	2	1	1	0
Minnesota	2	0	0	0	1	0	0	0	0	0	0	0
Mississippi	0	0	0	0	0	0	0	0	2	0	0	0
Missouri	2	2	0	0	0	1	0	0	0	2	0	0
Montana	0	0	0	0	0	0	0	0	0	0	0	0
Nebraska	0	1	0	0	1	2	0	0	3	1	1	0
Nevada	1	0	0	0	0	0	0	0	0	0	1	0
New Hampshire	0	1	0	0	1	0	0	0	0	1	0	0
New Jersey	6	4	2	1	2	5	6	1	1	2	1	1
New Mexico	0	1	0	0	0	1	0	0	0	0	0	0
New York												
1st Dept	6	5	3	0	4	2	2	2	6	5	3	6
2d Dept	2	2	0	1	2	2	2	1	8	0	1	2
3d Dept	0	0	0	0	1	0	0	0	2	0	0	1
4th Dept	0	0	1	0	0	1	0	0	1	1	0	0
North Carolina	2	1	0	0	1	0	1	0	1	0	0	0
North Dakota	0	1	1	0	0	1	0	0	0	0	0	0
Ohio	3	2	0	1	3	0	0	0	2	3	0	2
Oklahoma	2	1	1	0	1	1	2	0	2	2	0	1
Oregon	3	3	0	0	4	4	2	2	6	5	1	0
Pennsylvania	2	3	0	1	2	1	0	0	5	0	3	1
Rhode Island	0	2	1	0	0	0	1	0	0	0	0	0
South Carolina	1	0	0	0	2	0	0	0	1	0	0	0
South Dakota	0	0	0	0	0	0	1	0	1	0	0	0
Tennessee	4	0	0	0	1	0	0	0	0	0	0	0
Texas	1	6	0	0	1	4	5	0	2	4	2	0
Utah	0	0	0	0	0	1	0	0	2	0	0	0
Vermont	1	0	0	0	0	0	0	0	0	0	0	0
Virginia	0	1	2	1	0	1	0	5	3	3	0	0
Washington	0	0	0	0	1	0	0	0	1	0	0	0
West Virginia	0	2	1	0	0	2	0	0	1	0	0	0
Wisconsin	1	0	0	0	2	0	1	1	3	0	1	0
Wyoming	0	0	0	1	0	0	0	1	0	0	0	0
TOTALS	65	56	24	18	53	49	34	35	81	59	31	39

Reginald Heber Smith has practiced law in Boston since 1914. He is one of the pioneers in the Legal Aid movement in the United States and served as Director of the Survey of the Legal Profession. He was awarded the American Bar Association Medal in 1951.

The depositor does not lose because Federal Deposit Insurance Corporation fully insures all but the very largest accounts. In addition banks carry employee dishonesty insurance and can obtain insurance coverage up to one million dollars at low cost.

A newspaper account of a bank embezzlement almost always concludes by pointing out that no depositor will suffer any loss.

Lawyers, like bankers, handle money that belongs to other people. The temptation is there and, in an imperfect world, a few will succumb.

What Federal Deposit Insurance has done for the banks and their depositors, lawyers can do for themselves and at modest cost. The method for honoring our professional debt of honor is called Clients' Security Fund.

Table II

Annual Report	Period Covered	Disbarments	No. of[1] Lawyers	Per Cent Disbarred
2d	September 1, 1955-August 31, 1956	56	202,037	0.027
3d	September 1, 1956-August 31, 1957	65	219,380	0.030
4th	September 1, 1957-August 31, 1958	53	235,783	0.022
5th	September 1, 1958-August 31, 1959	81	242,970	0.033

1. In its reports on number of lawyers Martindale-Hubbell gives us "Total Lawyers Accounted For" and "Total Lawyer Listings" in its LAW DIRECTORY. The figure of "Lawyers Listed" is used in this article because it is the more conservative figure and it is the more accurate when any detailed correlations are attempted.

Statistical Note

Lawyers with a keen eye for figures will note that in Table II there is only one zero to the right of the decimal point whereas the tables in prior reports had two zeros.

This table is correct. The earlier ones were erroneous.

For correcting my mistake I am greatly indebted to M. J. Reigert, of the Cleveland Bar.

Experience in Missouri with Judicial Selection under the Non-Partisan Plan

The Missouri Plan for non-partisan selection of judges has now been in effect nineteen years. Mr. Gershenson describes the plan and its success in Missouri.

Harry Gershenson • *of the Missouri Bar (St. Louis)*

THE IMPORTANCE OF selecting judges is paramount in our American system. The questions are, how to select a good judge, how to keep him on the Bench if he is a good judge and how to remove him if he fails to serve as a good judge.

Undoubtedly, a good judge must have three important qualities: personal integrity, judicial temperament and adequate legal training. The Missouri Plan which has been a part of the Constitution of Missouri since 1940, is intended to make possible the recognition of these essential judicial qualities in selection and to make the tenure of the judge dependent upon satisfactory service and not upon political prowess.

The experience in the federal system has not been altogether satisfactory because too often the sponsors of candidates for the Bench take into consideration political considerations. Since the President relies upon Senators for support in many matters in his administration, it is quite likely that he may give great weight to the Senators' choice for judges rather than to the recommendations of the Bar.

The foundation of our legal system is the respect of our people for the law. This depends primarily upon confidence in the independence, ability and integrity of the judges who administer it. Requiring judges to run on party tickets with other candidates who are active in the political party which is supporting them is certainly not the best way to create such confidence or to maintain judicial independence. Over the years it has been learned that there can be no partisanship in the administration of justice, and there certainly should be none in the selection of judges who administer justice.

James Bryce, writing the *American Commonwealth* in 1889 commented:

> Any one of the phenomena I have described—popular elections, short terms, and small salaries—would be sufficient to lower the character of the judiciary. Popular elections throw the choice into the hands of political parties, that is to say, of knots of wire-pullers inclined to use every office as a means of rewarding political services, and garrisoning with grateful partisans posts which may conceivably become of political importance. Short terms oblige the judge to remember and keep on good terms with those who have made him what he is, and in whose hands his fortunes lie. They induce timidity, they discourage independence.

In 1940 the voters of Missouri, by amendment of the state's constitution, changed the method of selection and tenure of judges as applicable to the Missouri Supreme Court with seven judges, the three Courts of Appeals with three judges each, and the trial courts, the Circuit Courts of St. Louis and Kansas City. The new plan for selecting judges also applied to the Probate Judges of St. Louis and Kansas City and to the Court of Criminal Correction in St. Louis. As to all other trial courts in the state, it is optional with the voters of any circuit to adopt the plan in a local option election, if they so desire. Before doing so, however, it would require an enabling act of the legislature. This was not envisioned when the plan was prepared, but it seems to be necessary in the judgment of many qualified lawyers in this field.

The plan was sponsored by The Missouri Bar Association, which conducted a vigorous campaign, raising funds from lawyers and laymen alike for this purpose. Public relations counselors were used to present the plan in the best possible manner to the citizens. The newspapers were most cooperative, and after a vigorous campaign the people of Missouri adopted the plan.

The plan employs the following method for selection of the judges:

1. The judges are nominated by non-partisan, non-salaried commissions, composed of both laymen and lawyers.

2. The judge is appointed by the governor from a list of three nominees presented to him by the commission.

3. After a brief trial period of at least twelve months, the judge must be voted on and approved by the people in order to remain in the office to which he was appointed.

The Commission which chooses the Judges for the Supreme Court and the three Courts of Appeals is composed of the Chief Justice of Missouri, as chairman, three lawyers elected by the Bar and three laymen appointed by the governor. The members, other than the

Harry Gershenson was President of the Missouri Bar in 1957-1958. A native of St. Louis, he was admitted to the Missouri Bar in 1923. He is a graduate of Benton College of Law and has taught legal ethics at St. Louis University. He represents the Missouri Bar in the House of Delegates of the American Bar Association.

Chief Justice, have six-year terms, staggered so that one term expires at the end of each year. These members are not eligible to succeed themselves. The lay members are appointed by the governor, one every two years, each from a different Court of Appeals district. The lawyer members are elected, one every two years, by the members of the Bar in the Court of Appeals district which they represent. The ballots for the election of lawyer members are sent out by mail by the Clerk of each Court of Appeals, and returned to him to be canvassed by the judges or lawyers appointed by them. The commissions for the Circuit and Probate Courts have five members. They consist of the Presiding Judge of the Court of Appeals of the district in which the Circuit Court is located, as chairman, two laymen appointed by the governor, and two lawyers elected by the Bar. They also have six-year terms which are so staggered that the term of each member expires in a different year. Members of these commissions are likewise limited to one term, and no governor can appoint all of the lay members of these commissions, because the governor has a four-year term and cannot succeed himself. The members of these commissions cannot hold any public office nor any official position in a political party.

At the next general election following a year of service by an appointed judge, the question of whether or not such judge shall have a full term is determined. In the trial courts, the judges have six-year terms and in the appellate courts twelve-year terms. Thereafter, a judge who is given a full term must submit his declaration of desire for another term before the expiration of his term and be voted on by the people. Likewise, all other judges who were in office at the time the amendment was adopted were required to be voted on by the people when their terms expired. At such elections, the judges' names are placed on separate judicial ballots without party designation, and on the ballots appears the question: "Shall Judge..... of the ..... Court be retained in office? Yes. No." The voters scratch one answer and leave the other. The judge has no opponent and runs against no political party, but only on his record. Unless the record is corrupt or very bad, there is every reason to expect such judges to receive favorable votes. The voters nevertheless may dispense with the services of a judge if they see fit. In only one instance has this happened in Missouri.

It is the view of Missouri lawyers that the plan has the best features of both the appointive and elective systems and provides safeguards lacking in either of the systems. It gives the Bar a chance to express its views and the people a chance to pick their judges. The governor has the last say as to the appointment. Much publicity is given when a vacancy exists, and suggestions for filling the vacancy are invited from the Bar and the public. The commission is receptive to suggestions from any source, and has encouraged in the past any lawyer who is interested to come and meet them and talk with them. The members of the commission are courteous, friendly, but, of course, most careful to make no commitments.

This plan has now been in existence nineteen years, and each time that it has been challenged the voters have decisively sustained it. The Missouri Bar has encouraged the voters to cast their ballots because under the plan a judge requires only a simple majority for retention. Nevertheless, if the voters are apathetic and do not vote, a small but militant minority could defeat a good judge.

We had an experience with that recently when some labor unions sought to defeat several of our Supreme Court Judges who, they thought, were unfriendly to labor. These unions really went out on the stump. The Missouri Bar, through publicity and activity on the part of its members, aroused the voters to cast their ballots. The voters overwhelmingly reelected these judges. The judges did nothing, as they are under the law prohibited from any political activity.

At each election the Missouri Bar has sponsored a secret poll on the judges who are running. The results are then publicized by The Missouri Bar at its expense so that the voters may know what the lawyers think about the judges. Any judge not receiving a majority of the votes of the lawyers would be disapproved by The Missouri Bar for retention in office and such a result fully publicized.

Since the plan contemplates that the judge cannot in anywise engage in political activities, either by contributing or doing anything whatsoever of a political nature, the Bar has felt that it must carry the ball to see that the judges are voted on by the voters and that the results of the secret Bar polls are given to the voters. The judge really is in no position to do anything but sit back and await the inevitable. We have just conducted a judicial poll on nine Circuit Judges who were running in St. Louis, six who were running in Kansas City and one member of the Kansas City Court of Appeals. All of these judges ran for retention in office under the plan which I have outlined. All were reelected by thumping majorities.

The plan, of course, is not perfect and requires vigilance on the part of the people and the lawyers to make it work properly. The people must be intelligent in their voting and the law-

yers likewise must be diligent and courageous in expressing their views as to the qualifications of judges. After all, the lawyers know the most about whether nominees have the essential judicial qualities, and they should be prepared to be in the forefront of all campaigns to see that the plan works and to see that worthwhile men are retained in office. By the same token they should not be afraid to oppose those who are not qualified to be retained.

The Bar of Missouri is integrated. Some 7200 lawyers under Supreme Court rule have an organization through which they can be heard and which can be effective. It is becoming stronger constantly, and the activities of The Missouri Bar are growing. Particularly is The Missouri Bar vitally interested in maintaining a fine judiciary elected on a non-political basis and only on the basis of merit and qualifications.

The political parties have respected the plan and have made no effort to influence elections under it. Our court dockets have been expedited, and the judges have been able to put their time in on their judicial duties rather than in worrying about the next primary and election.

Our experience in Missouri has likewise shown that judges who originally went on under political umbrellas and through political organizations have become fine non-partisan judges, since the pressure of politics is off their backs. They need not worry about the next election or about the committeemen. While we know that many fine judges were elected under the old system, we feel in Missouri that the independence of the judges, both politically, financially and in the matter of tenure and retirement, is of such great importance and has been so effective that our judiciary has improved in stature and in the quality of its work.

Those judges who have served twelve years are permitted to retire under the Non-Partisan Court Plan on one-third pay for life after reaching the age of 65. Those judges who become sick during their term may retire on half pay for the balance of their term, and one-third pay thereafter. There is a movement afoot to give the judges at least half pay when they retire. The present salary of Circuit Judges in Missouri, St. Louis and Kansas City is $14,000. In the Court of Appeals the salary is $16,000, and in the Supreme Court $17,500. It is thus evident that the retirement on one-third salary is hardly adequate for a decent standard of living for a retired judge. Eventually, we hope to be able to work out a plan whereby judges may retire as in the federal system on full pay. This will draw to the Bench many lawyers who have incomes far in excess of those of the judges but who want to serve as judges and at least to have a reasonable income for their needs.

In Missouri we have lived under the non-partisan court plan for nineteen years. We know what it does and does not do. It is not perfect. Nevertheless, the appointments under the plan have on the whole been of lawyers who have developed into fine judges in every way.

We have just gone through a political campaign in St. Louis County for the selection of circuit judges. I had something to do with the campaign in behalf of several of the judges, and know what a terrible amount of time, effort, energy and expense it required for them to be elected. The time which judges seeking reelection spent in making speeches at political meetings and attending barbecues, fish fries and other social and political functions certainly interfered with their work. While it is true that these meetings were held at night and that the judges all sat during the day, I cannot but feel that it must have had some effect on their ability to get their work finished.

I have spoken with several of the judges who have just been elected under the plan and they are heartily in favor of the new system, appreciating it more now than ever. It is not with a notion of "freezing" these men in office, but rather to relieve them from pressure of political campaigns and political organizations. This is not to imply that any judge elected under the political system would not do the right thing in any case. It does imply, however, that there is the constant threat to a judge of reprisal by a political group for his judicial actions.

The complaint is made that the plan "freezes" judges in office. This is true. Our experience in St. Louis has been that in the nineteen years that the plan has been in effect there has been an almost complete turnover by reason of time and death of judges who were "frozen" in office.

Again I must mention that our Democratic governors have appointed Republicans to the bench. None of these Republicans could have stayed in office in St. Louis at the last election, because there was a sweeping Democratic victory. Nevertheless, they are all in office and conducting their judicial duties without fear of political pressures or loss of their judicial positions. This is the greatest feature of the plan—that men can be appointed to the Bench from political parties other than those in power and remain in office so long as they properly conduct themselves.

Kansas has just adopted the Missouri Plan for the selection of its appellate judges. I had occasion to talk there with some of the leaders of the Bar and others and learned that some of the men who had been most violently opposed to the plan concluded that it was the right plan and came out for it. I take no personal credit for this, but believe that the strength of the plan is such as to appeal to the reason of lawyers and citizens everywhere.

It works in Missouri.

Nominating Petitions

Illinois

The undersigned hereby nominate Barnabas F. Sears, of Chicago, for the office of State Delegate for and from the State of Illinois to be elected in 1960 for a three-year term beginning at the adjournment of the 1960 Annual Meeting:

John S. Petersen, of Aurora;

Benedict W. Eovaldi, of Benton;

Wayland B. Cedarquist, Delbert A. Clithero, Gordon R. Close, John W. Freels, Charles E. Green, J. Francis Dammann, Frederick Mayer, Julius H. Miner, Claude A. Roth, Jacob Shamberg, Floyd J. Stuppi and Vernon M. Welsh, of Chicago;

Casper Platt, of Danville;

Gus T. Greanias, of Decatur;

Cassius Poust, of DeKalb;

Norman J. Gundlach, of East St. Louis;

Charles G. Seidel, of Elgin;

Gordon Franklin, of Marion;

Earl R. Anderson, of Paris;

Edwin V. Champion, of Peoria;

Hugh J. Graham, Jr., of Springfield;

Lewis D. Clarke, of Waukegan;

Maurice L. Bluhm, of Winnetka.

Iowa

The undersigned hereby nominate Ingalls Swisher, of Iowa City, for the office of State Delegate for and from the State of Iowa to be elected in 1960 for a three-year term beginning at the adjournment of the 1960 Annual Meeting:

Fred H. Kubicek, J. J. Locher, Jr., Thomas H. Pirnie, Eldon L. Colton, James F. Pickens, Byron G. Riley, Jr., W. R. Shuttleworth, John C. Stevens and William O. Gray, of Cedar Rapids;

Roy W. Van Der Kamp, Henry N. Neuman, Elliott R. McDonald, Jr., John C. Shenk, Jr., Maxwell M. Miller, Jr., Margaret Stevenson, Robert D. Wells, J. M. Chamberlin and W. W. Brubaker, of Davenport;

Walter L. Stewart, Peter W. Janss, George A. Wilson, John H. Hughes, Jr., Charles F. Wennerstrum, Walter R. Brown and Neill Garrett, of Des Moines.

Maine

The undersigned hereby nominate David A. Nichols, of Camden, for the office of State Delegate for and from the State of Maine to be elected in 1960 for a three-year term beginning at the adjournment of the 1960 Annual Meeting:

George A. Wathen and George H. Hunt, of Augusta;

John L. Easton, Jr., John W. Ballou, Morris G. Pilot, Lewis V. Vafiades, Edward H. Keith, Edward I. Gross, Nicholas P. Brountas and Abraham J. Stern, of Bangor;

Clement F. Robinson, Joseph A. Aldred and David Klickstein, of Brunswick;

Alexander R. Gillmor, of Camden;

David Solman, of Caribou;

Edward T. Richardson, Jr., John D. Leddy and Roger A. Putnam, of Portland;

Samuel W. Collins, Jr., Christy C. Adams, Stuart C. Burgess, Christopher S. Roberts, John L. Knight and Peter P. Sulides, of Rockland.

Michigan

The undersigned hereby nominate Fred Roland Allaben, of Grand Rapids, for the office of State Delegate for and from the State of Michigan to be elected in 1960 for a three-year term beginning at the adjournment of the 1960 Annual Meeting:

Nuel N. Donley and Donald H. Worcester, of Big Rapids;

Paul R. Erickson, Robert G. Jamieson, Frederic B. Besimer and Clarence B. Slocum, of Detroit;

Francis X. Fallon, Douglas W. Hillman, David E. Nims, Jr., Joseph A. Renihan, John H. Vander Wal, Don V. Souter and Richard N. Servass, of Grand Rapids;

Francis L. Sage and Charles E. Starbuck, of Kalamazoo;

Everett R. Trebilcock, Archie C. Fraser, Benjamin F. Watson, Milton E. Bachmann, Joseph Planck and Sam Street Hughes, of Lansing;

H. Winston Hathaway, Lou L. Landman, V. S. Laurin, Jr., and Seymour I. Rosenberg, of Muskegon.

Montana

The undersigned hereby nominate Norman Hanson, of Billings, for the office of State Delegate for and from the State of Montana to be elected in 1960 for a three-year term beginning at the adjournment of the 1960 Annual Meeting:

E. A. Blenkner, of Columbus;

Selden S. Frisbee, John P. Moore, Lloyd A. Murrills, Dan S. Welch and Wilbur P. Werner, of Cut Bank;

R. C. Harken, Russell K. Fillner and F. F. Haynes, of Forsyth;

John B. Kuhr, Burton O. Bosch, J. Chan Ettien, Fred J. Weber, Edward J. Ober, Jr., Jess L. Angstman and John D. Gillan, of Havre;

Merritt N. Warden, Wm. C. Walterskirchen, Dan J. Korn, Calvin S. Robinson, James E. Murphy and Robert S. Keller, of Kalispell;

Hugh J. Lemire, Daniel G. Kelly and James P. Lucas, of Miles City.

Texas

The undersigned hereby nominate William N. Bonner, of Houston, for the office of State Delegate for and from the State of Texas to be elected in 1960 for a three-year term beginning at the adjournment of the 1960 Annual Meeting:

Major T. Bell, of Beaumont;

J. Cleo Thompson, of Dallas;

Eugene R. Smith, of El Paso;

Maurice R. Bullock, of Fort Stockton;

Dillon Anderson, F. L. Andrews, F. T. Baldwin, J. S. Bracewell, C. E. Bryson, Cecil N. Cook, Joyce Cox, Warren J. Dale, Thomas Fletcher, Calvin B. Garwood, Newton Gresham, Walter S. Higgins, Palmer Hutcheson, Albert P. Jones, John T. Maginnis, Wright Morrow, Latimer Murfee, Nowlin Randolph, R. A. Shepherd and Wharton Weems, of Houston;

Wilford W. Naman, of Waco.

Three-Judge District Courts: Some Jurisdictional Problems

Mr. Berg's article treats of a subject which, he declares, needs to be better understood by the Bar. The jurisdiction of a statutory three-judge United States District Court often presents perplexing questions. Mr. Berg has written a summary of the considerations that bear on the problem.

by Raymond K. Berg • *of the Illinois Bar (Chicago)*

THE GREAT INCREASE in cases filed in United States District Courts praying injunctive relief against enforcement of alleged unconstitutional state statutes[1] has crystallized many of the uncertain jurisdictional aspects of three-judge courts. The many members of both Bar and Bench who have been involved in three-judge proceedings during the past year are keenly aware of these perplexing jurisdictional problems and have contributed greatly to their eventual solutions.

Title 28, U.S.C., Section 2281 provides:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title.

Title 28, U.S.C., Section 2284, insofar as pertinent, provides:

> In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:
>
> (1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the Circuit, who shall designate two other judges, at least one of whom shall be a Circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.
>
> ... (5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

Whether it is spoken of in terms of "delegated" and "reserved" powers of the United States Constitution, or the philosophy of "state's rights", it is clear that Congress was concerned with delicate federal-state relationships when it enacted Section 2281 and its predecessor sections. Congress intended to prevent any unnecessary or improvident interference by the federal courts with proper and validly administered state concerns and so required that three judges deliberate such relief.[2] The strict construction which must be given to Section 2281 as a result of its underlying philosophy,[3] has served to confuse three distinct principles of federal jurisdiction. These three principles are (1) original federal jurisdiction; (2) equitable jurisdiction; and (3) "discretionary abstention".

Original Jurisdiction

Aside from diversity of citizenship jurisdiction, it is clear that the complaint cannot rest upon the mere allegation that state officials are attempting to enforce an alleged unconstitutional state statute, but must go further and present a "substantial federal question".[4] As to the definition of a "substantial federal question", the Supreme Court of the United States has stated that there must be a "substantial claim of the unconstitutionality of a state statute", and also that "The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject."[5]

1. The annual report of Warren Olney III, Director of the Administrative Office of the United States Courts, on September 3, 1958, showed a total of forty-seven three-judge cases heard during the fiscal year July 1, 1957, to June 30, 1958. The past year has witnessed a profound increase in the applications for the convening of three-judge courts.
2. *Harrison* v. *N.A.A.C.P.*, 360 U. S. 167 (1959); *Phillips* v. *U. S.*, 312 U. S. 246 (1940); *Cumberland Tel. Co.* v. *Pub. Serv. Comm.*, 260 U. S. 212 (1922).
3. *Phillips* v. *U. S.*, *supra*, at pages 250, 251.
4. *California Water Service Co.* v. *Redding*, 304 U. S. 252 (1937).
5. *California Water Service Co.* v. *Redding*, *supra*, at pages 254, 255.

Ricardo Studio

Raymond K. Berg is law clerk to Chief Judge Campbell of the United States District Court for the Northern District of Illinois. He received his A.B. and J.D. degrees from DePaul University in Chicago and was admitted to the Illinois Bar in 1957. He attended Cambridge University in England, where he received a diploma in comparative law studies. He serves as a part-time faculty member at DePaul.

Clearly, a "substantial federal question" is wanting where the United States Supreme Court has upheld the constitutionality of the challenged statute;[6] or the subject matter of the statute is without the purview of the United States Constitution;[7] or the complaint fails to allege the necessary jurisdictional amount;[8] or if the challenge is to a local ordinance having only local application;[9] or if the alleged unconstitutionality is not directly attributable to the state statute but merely goes to the results of official action taken pursuant to an erroneous construction of the statute.[10]

Though the above principles are capable of confusion, the greatest difficulty in regard to original jurisdiction occurs when a challenged state statute has never been construed by the state courts and, if given one construction is clearly constitutional while if given another, it may be unconstitutional. The philosophy of Section 2281 demands that the state courts should have the first chance to construe their own statutes but meanwhile, has a "substantial federal question" been presented within the jurisdiction of a three-judge court? In other words, should the action be dismissed or should the court hold jurisdiction while the parties obtain a state court construction of the statute? The true analysis of this problem was given by Justice Cardozo in *Gully* v. *First National Bank*,[11] when he pointed out that a question of federal law, "lurking in the background", awaiting the prior determination of other non-federal issues, is insufficient to support the original jurisdiction of the federal courts. A recent application of this principle occurred in *Hershey Mfg. Co.* v. *Adamowski*,[12] where a three-judge court, with one dissent, dismissed an action for lack of original jurisdiction. The plaintiff challenged, as unconstitutional, an Illinois statute,[13] under which it was alleged, state officials seized slot-machine sub-assemblies and parts at plaintiff's plant and at a Chicago airport. The statute had never been construed by the Illinois courts and presented the following problems of construction to the three-judge court:

(1) Did the statute apply to parts and sub-assemblies of slot-machines;

(2) Did it apply to parts and sub-assemblies of slot-machines, in interstate commerce;

(3) If it did apply to parts and sub-assemblies of slot machines, were such parts and sub-assemblies *contraband* under Illinois law, and as such, not entitled to constitutional protection. Since the presence of a "federal question" depended upon the answer to the above questions and since the Illinois state courts had not construed the statute, the three-judge court dismissed for lack of a "substantial federal question".

Equitable Jurisdiction

Even if a three-judge court possesses original jurisdiction to hear a cause, the court may lack jurisdiction in equity to grant the relief requested, if, for example, it is seen that the plaintiff will not suffer an immediate and irreparable harm, or that plaintiff has an adequate remedy at law, or that plaintiff has unclean hands.[14]

Thus, besides a "substantial federal question", the face of the complaint, unaided by other pleadings,[15] must allege immediate and irreparable injury and lack of an adequate remedy at law. Furthermore, though neither Section 2281 nor Section 2284 expressly so provides, it is now well established that it is the duty of the district judge to whom an application for the convening of a three-judge court is made to dismiss the action if either original jurisdiction or equitable jurisdiction is clearly lacking.[16]

Discretionary Abstention

Even if a three-judge court has original and equitable jurisdiction of a cause, it may still be restricted in its power to act because of the doctrine of "discretionary abstention". This well-established procedure, aimed at avoiding "needless friction with state policies",[17] has been applied in many contexts[18] but none more consistent than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them.[19] In such a situation the three-judge court does not abdicate its original jurisdiction but merely postpones its exercise in order to allow the state courts a reasonable opportunity to construe the statute in question.

It is immediately obvious that the principle of original jurisdiction and the doctrine of "discretionary abstention" may become confused in the event a three-judge court is called upon

6. *Illinois* v. *Jarecki*, 116 F. Supp. 422 (D.C. Ill. 1953).
7. *Haines* v. *Castle*, 226 F. 2d 591 (7th Cir., 1955). Also see *Sligh* v. *Kirkwood*, 237 U. S. 52, 60 (1915); *Lawton* v. *Steele*, 152 U. S. 133, 136, 142-143 (1894).
8. *Jacobs* v. *Tawes*, 250 F. 2d 611 (4th Cir., 1957).
9. *Ex parte Public Bank*, 278 U. S. 101 (1928).
10. *Ex parte Bransford*, 310 U. S. 354 (1940).
11. 299 U. S. 109 (1936).
12. D.C. N.D. Ill. E.D. (No. 58 C 1287, February 9, 1959).
13. Chap. 38, Sections 344-348, Ill. Rev. Stat.
14. *Toomer* v. *Witsell*, 334 U. S. 385 (1948); *American Federation of Labor* v. *Watson*, 327 U. S. 582 (1946).
15. *Gully* v. *First National Bank*, *supra*.
16. *California Water Service Co.* v. *Redding*, *supra*; *Eastern States Petroleum Corp.* v. *Rogers*, 265 F. 2d 593 (Dist. Col. 1959); *Klein* v. *Lee*, 254 F. 2d 188 (7th Cir., 1958); *Jacobs* v. *Tawes*, *supra*; *Haines* v. *Castle*, *supra*; *Lineham* v. *Waterfront Commission of New York Harbor*, 116 F. Supp. 401 (D.C. S.D. N. Y. 1953).
17. *Harrison* v. *N.A.A.C.P.*, *supra*; *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U. S. 25 (1959); *County of Allegheny* v. *Mashuda Co.*, 360 U. S. 185 (1959).
18. See dissent in *Louisiana Power & Light Co.* v. *City of Thibodaux*, *supra*.
19. *Harrison* v. *N.A.A.C.P.*, *supra*.

to adjudicate the constitutionality of an unconstrued state statute which is capable of various interpretations. If jurisdiction can be based upon diversity of citizenship, as was the case in *Harrison* v. *N.A.A.C.P., supra; Louisiana Power & Light Co.* v. *City of Thibodaux, supra;* and *County of Allegheny* v. *Mashuda, supra,* then the doctrine of "discretionary abstention" is applicable. However, if the complaint seeks to gain original jurisdiction by virtue of a "substantial federal question", then the cause should be dismissed for lack of original jurisdiction. *Gully* v. *First National Bank, supra.*

A great deal of attention has been focused upon the importance of distinguishing and properly applying the principles of original and equitable jurisdiction, and the doctrine of "discretionary abstention", when involved in three-judge court proceedings under Section 2281. In this regard, it would also be well to point out that the Supreme Court of the United States, in its recent applications of the doctrine of "discretionary abstention", has apparently misconstrued the use of the doctrine before three-judge courts under Section 2281.

In essence, Section 2281 is concerned with the *unconstitutionality* of state statutes and the restriction of the enforcement of such statutes. If a citizen of a state seeks to enjoin the enforcement of an alleged unconstitutional state statute which is capable of various interpretations, some of which would be constitutional, the complaint may be dismissed for lack of a "substantial federal question". However, if an out-of-state citizen challenges the same statute, the court possessed with original jurisdiction will retain that jurisdiction and allow the parties a reasonable time to seek an adjudication of the statute by a state court. In other words, an out-of-state citizen, without presenting a "substantial federal question", will enjoy a greater protection from the federal courts than a citizen of the state whose statute has been challenged. It would seem that such an interpretation is not only contrary to the underlying purpose of diversity of citizenship jurisdiction, but it is also contrary to the true and necessary jurisdictional requirement of Section 2281—a "substantial federal question".

A Trilogy of Massive Resistance

Andrew Jackson, when President, on learning of the Supreme Court's decision in *Worcester* v. *Georgia*, 6 Pet. 515 (1832), is reported to have said, "John Marshall has made his decision: now let him enforce it!" Mr. Demet recalls this case and similar cases where state governments have refused to obey mandates of the United States Supreme Court.

Francis J. Demet • ***of the Wisconsin Bar (Milwaukee)***

The purpose of this article is solely to present a historical and factual account of past refusals by three states to obey mandates of the United States Supreme Court.

On September 18, 1850, the Congress of the United States of America enacted and promulgated what has been popularly called the Fugitive Slave Law. The substance of the Fugitive Slave Law continued the role of the slave as an item of personal property and allowed its owner the use of federal process to recapture a runaway slave and to punish those aiding and abetting the runaway. Certain of the states of the Union, among them Wisconsin, were offended sociologically and ideologically by the enactment and enforcement of the Fugitive Slave Law. In the State of Wisconsin, the birthplace of the Republican Party, as it is now known, this resentment was very strong. The Republicans of that day, within the State of Wisconsin and elsewhere, were a protestant group dedicated to the proposition that human beings, regardless of race or color, should not be classified and trafficked as an item of personal property. This liberal and dissident outlook permeated the state in a short period of time.

I

Into this background there arose in Milwaukee County the case of *Ableman* v. *Booth*, 21 How. 506, 16 L. ed. 169 (1859). Booth was held in custody by Ableman, the United States Marshal, upon a charge of having, in March, 1854, in Milwaukee, Wisconsin, aided and abetted the escape of a fugitive slave, contrary to the Fugitive Slave Law. The Supreme Court of the State of Wisconsin, on a writ of habeas corpus, discharged Booth from custody. Later Booth was tried before the United States District Court, convicted, sentenced to imprisonment and fined. The Supreme Court of the State of Wisconsin again ordered his release, on a writ of habeas corpus, holding that the Fugitive Slave Law was unconstitutional. The case was then brought to the United States Supreme Court on writ of error.

Chief Justice Taney, of the United States Supreme Court, then 82 years of age and previously in favor of states' rights, wrote the opinion reversing the judgment of the Supreme Court of Wisconsin. Taney stated in reversal that in a sphere of action appropriate to the judicial system of the United States of America, the action in this case of the Sovereign State of Wisconsin is far beyond reach of the judicial process issued by a state judge or a state court and is therefore reversible error. The Fugitive Slave Law was thus upheld as the supreme law of the land.

In a spectacular show of disobedience to the mandate of the Supreme Court of the United States, the Supreme Court of the State of Wisconsin refused to make return to the writ of error issued out of the Supreme Court of the United States.

In a further and more spectacular show of disobedience the motion to file the remittitur in *Ableman* v. *Booth*, 11 Wis. 498, was denied by the Supreme Court of the State of Wisconsin, by Justice Cole, without a written decision. Chief Justice Dixon of the Wisconsin Supreme Court wrote a minority opinion on the motion to file the remittitur, stating in substance that the remittitur should be filed and honored. To the best of the writer's knowledge the remittitur has not been filed to this day in the office of the Clerk of the Supreme Court of the State of Wisconsin.

The idealistic, proper and correct opinion of Chief Justice Dixon, which was later proved to be historically true and correct, militated against him at a

subsequent election when he attempted to retain his position and seat upon the Wisconsin Supreme Court. He was overwhelmingly defeated in a general election.

Subsequent litigation in the federal and state courts of Wisconsin allowed the Marshal to replevy the slave and to recover a money judgment for the unlawful detention.

In spite of the final outcome of *Ableman* v. *Booth*, the Wisconsin Supreme Court, thirteen years later ordered the release of an enlisted soldier held in the custody of a recruiting officer of the United States Army. Again the United States Supreme Court denied the authority of a state court to issue a writ of habeas corpus for the release of persons held under the authority or claim and color of authority of the United States Government. Justice Field speaking for the Court laid down the rule that neither sovereign "can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National Government to preserve its rightful supremacy in cases of conflict of authority".[1]

II

At an earlier date the Sovereign State of Virginia and its Supreme Court refused to adhere to and recognize a mandate of the United States Supreme Court. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 4 L. ed. 97 (1860), originated as an ejectment action in the Winchester, Virginia, District Court. Hunter, the plaintiff, sued Martin, the defendant, to recover possession of certain Virginia land. Martin, the defendant, based his right and title to the land upon the construction of a treaty between the United States and Great Britain and the fact that he was an heir of Lord Fairfax. The trial court held for the defendant and the Court of Appeals of Virginia decided in favor of the plaintiff. Martin appealed this decision to the Supreme Court of the United States under Section 25 of the Judiciary Act of 1789 which gave to the Supreme Court of the United States appellate jurisdiction over the decisions of state courts in certain cases arising under the Constitution of the United States. On reversal, the Court of Appeals of Virginia refused to obey the mandate of the Supreme Court of the United States, stating in substance that Congress had no power to give the Supreme Court appellate jurisdiction over the state courts and Section 25 of the Judiciary Act was void. This decision was then brought to the Supreme Court of the United States under Section 25 of the Judiciary Act for review on writ of error.

Justice Story, then 37 years of age, wrote the opinion reversing the judgment of the Virginia Court of Appeals, stating in substance that in a proper case the United States Supreme Court has appellate jurisdiction over the courts of last resort of the various state courts. The Court, in view of the delicate situation, did not issue a second mandate to the Virginia Court of Appeals but issued the mandate directly to the District Court in the county in which the land was located and the suit had originated.

In the comparatively recent case of *Naim* v. *Naim*, 197 Va. 734, 90 S.E. 2d 849, the Virginia Supreme Court held that under its rules of practice and statutes it was without power to obey the mandate of the United States Supreme Court's *per curiam* decision in *Naim* v. *Naim*, 350 U. S. 891, 100 L. ed. 784, 76 S. Ct. 151. The United States Supreme Court, by its mandate, ordered the Virginia Supreme Court to return a divorce case based on the miscegenation statute to the trial court for further findings and vacated the judgment of divorce. When the case was returned to the United States Supreme Court, 350 U. S. 891, 76 S. Ct. 151, on March 12, 1956, by motion to recall the mandate and to set the case down for oral argument upon the merits or, in the alternative, to recall and amend the mandate, the motion was denied on the ground that the action of the Virginia Court of Appeals in response to the Supreme Court's mandate left the case devoid of a properly presented federal question.

III

Complete disobedience to the authority of the United States Supreme Court arose out of the *Cherokee Indian* case involving the Sovereign State of Georgia and its courts. In the first case the United States Supreme Court had issued a writ of error to the Georgia Supreme Court to review the conviction of Corn Tassel for the murder of another Cherokee Indian. Subsequent to the service of the writ of error, but prior to a hearing thereon, Corn Tassel was executed for the murder on the day originally set for his punishment. This execution was held contrary to the rights of the accused under federal law, since a writ of error superseded sentence until the appeal was decided. The execution was carried out in defiance of and disobedience to the process issued out of the United States Supreme Court because of legislative approval of the Governor of Georgia's outspoken policy that the judicial process of the Sovereign State of Georgia would not be interfered with by orders and writs of the federal court and that the Governor would resist by force any attempt to enforce them with all the forces at his command.[2]

Two years later in the equally spec-

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1. *United States* v. *Tarble* (Tarble's Case), 13 Wall. 397, 407-408 (1872).

2. For a full discussion of this matter see 2 Warren, SUPREME COURT IN UNITED STATES HISTORY 193-4; Baldwin, THE AMERICAN JUDICIARY 163.

tacular case of *Worcester* v. *Georgia*, 6 Pet. 515, 596 (1832), the Sovereign State of Georgia again defied the United States Supreme Court. In this case Worcester and Butler, two missionaries, were convicted of residing among the Indians without a license. The United States Supreme Court reversed the convictions on jurisdictional grounds holding the Georgia court had no authority within an Indian reservation. A special mandate ordering the release of Worcester was issued directly to the trial court. The trial court ignored the mandate of the United States Supreme Court after a pronouncement by the Governor of Georgia that he would resist the mandate of the Supreme Court with force if necessary. Worcester and Butler remained in a Georgia jail until they agreed to abandon further attempts to secure a writ of error from the Supreme Court of the United States. They were then pardoned by the Governor after further agreeing to leave the state. This case is reputed to have brought from President Jackson the statement, "Well, John Marshall has made his decision: now let him enforce it."

As demonstrated, disobedience, disrespect and massive resistance to the mandates of the United States Supreme Court are relatively old historical concepts practiced by various of the Sovereign States of the Union when it was felt the Court trespassed into spheres in which the various states had ideological and sociological views contrary to the edicts and mandates of the Court.

It is interesting to speculate what the state courts would have done if the segregation cases had reached the Supreme Court by way of state courts and not the federal courts.

Hague Academy of International Law Offers Summer Session for Lawyers

In 1923, the Carnegie Foundation furnished funds to aid in the establishment of The Hague Academy of International Law, which is housed in a side-building of the Peace Palace in The Hague, in The Netherlands. The palace is erected upon an international compound containing about twenty acres and also houses the International Court of Justice, the Permanent Court of International Arbitration, and the famous Peace Palace Library.

Each summer two three-week courses are offered by the Academy to judges, lawyers and law professors, diplomats and graduate students in public and private international law. The world's leading authorities lecture. In 1959 the auditors came from fifty-three countries of the world. They numbered 418, of whom forty-seven were from the United States. Many of those in attendance are leading lawyers of their countries.

The courses are given in English and French. The latter is translated into English simultaneously for those auditors who do not understand the language. In the 1959 session, the instructors were Professor Quincy Wright, of the University of Virginia; Ernest Hamburger, Dean of the Faculty of Law and Political Science of the Free School of High Studies of New York, and law professors from the Universities of Paris, Naples, Panama, São Paulo, Copenhagen, Bologna and Berlin, and lawyers from London and France, among others.

The auditors have formed an association, the Intergroup of Lawyers.

Any lawyer who matriculates and attends the session may join the Intergroup of Lawyers if he is in actual practice. The organization has had two recent American presidents, Jacob E. Max, of New Jersey, and Malcolm Long, both members of the American Bar Association.

During the course there is ample opportunity to meet and exchange views with attorneys from all over the world. Personal contacts thus made are maintained through this association by correspondence and meetings. This permits the selection of correspondents personally known in almost any part of the world.

The registration fee for the Intergroup is nominal, five guilders, and the Academy arranges for the lawyers and their wives to stay in Dutch homes during the session. The finest hospitality is extended to all visitors and the guests are constantly entertained at numerous social and formal functions including tours of Holland. This part of Europe is particularly pleasant climatically during the summer months. It affords an excellent opportunity for a member of the Bar in any of the United States to spend a very pleasant three weeks at The Hague while acquiring knowledge of international law and making the acquaintance of lawyers of many nationalities. Information may be obtained by writing to The Hague Academy of International Law, Peace Palace, The Hague, Holland, or by writing to Malcolm E. Long, 56 Rue St. André des Arts, Paris, France, or Jacob E. Max, 9 Brinkerhoff Street, Jersey City, New Jersey.

Books for Lawyers

LAW AS LARGE AS LIFE. *By Charles P. Curtis. New York: Simon and Schuster. 1959. $3.50. Pages 211.*

It has been my privilege to review two of the author's books for the JOURNAL and this must be the last because Mr. Curtis died shortly after the publication of this final volume.

On the evening of December 21 his home in Stonington, Connecticut, suddenly caught fire and roared into an inferno. He escorted his wife out of the house. Having assured the safety of his first love, he thought of a second love and returned to his study to retrieve a manuscript on which he had been working. He suffered burns from which he never recovered.

It is impossible to summarize this book just as it was impossible to condense *The Practical Cogitator* or *A Commonplace Book.*

Charles P. Curtis had one of the greatest and best disciplined minds of our generation. In addition to a busy law practice in one of Boston's best-known firms, he found time to read everything. For example, in the Index under the letter *B* you will find there are quotes from Francis Bacon, Katrina M. Barnes, Baudelaire, Joseph H. Beale, Carl L. Becker, Ruth Benedict, Adolf A. Berle, Jr., Isaiah Berlin, Harold J. Berman, A. M. Bickel, Hugo L. Black, Lord Blackburn, Niels Bohr, Chester Bowles, Joseph P. Bradley, Louis D. Brandeis, Ralph S. Brown, William Jennings Bryan, Lord Bryce, Edmund Burke, Harold H. Burton, John M. Butler, James F. Byrnes.

His memory was prodigious and of the photographic type so that he could not only recall what he had read but where to locate it for purposes of exact quotation.

His unique service to the legal profession, to which he was devoted, as well as to leaders of thought in all walks of life was to set forth this exciting fare for our consumption. But he insisted (page 3):

> So I ask you, do not believe anything I say. Examine it. Socrates told his judges that the unexamined life was not worth living. Nor is an unexamined thought worth thinking.

His central thesis is that through all law there is a persistent current of what is commonly called natural law which he would prefer to call moral law. Statutes enacted by Hitler's servile Reichstag were laws but not Law.

Antigone is its lovely heroine-martyr.

A fair summary in the author's own words appears at page 84.

> As MacLeish makes clear, the law we give ourselves is no law. The positive law which the state gives us is half law. The other, and indispensable, half is our natural law, and this we get from each other. It is taught, not told. We learn it . . .
>
> After all, what else is it that makes natural law so different from the positive law, if it is not the fact that our natural law is in the midst of us?

How many of us, except constitutional lawyers, have read *Louisiana* v. *Resweber,* 329 U. S. 459? Mr. Curtis uses this strange case to demonstrate why and how our judges are compelled to rely on natural law. (Pages 30 *et seq.)*

Willie Francis had been convicted of murder and sentenced to death by electrocution. He was strapped to the chair, the hood was placed before his eyes, the electrocutioner pulled down on the switch and at the same time said "Goodbye, Willie."

These words come from the affidavit of the prison chaplain.

Something went amiss and Willie did not die. He was sentenced to be electrocuted again. He appealed to the Supreme Court.

Would that be the sort of "cruel and unusual punishment" prohibited by the Eighth and Fourteenth Amendments?

This was not a case of a penniless Negro deprived of the assistance of counsel as guaranteed by the Sixth Amendment. His counsel was an able trial lawyer who is now a distinguished federal judge.

How would you decide the case?

Mr. Curtis always told his friends that he was a Stoic. But there is good evidence that he was a deeply religious man just as Abraham Lincoln was deeply religious. Perhaps the best evidence comes from this book itself.

The dedication is to Learned Hand but on the following page are these words taken from the Book of Ezekiel in the Old Testament:

> As the appearance of the bow that is in the cloud in the day of rain, so was the appearance of the brightness round about. This was the appearance of the likeness of the glory of the Lord. And when I saw it, I fell upon my face, and I heard a voice of one that spake.
>
> And he said unto me, Son of man, stand upon thy feet, and I will speak unto thee.

REGINALD HEBER SMITH

Boston, Massachusetts

ELM STREET POLITICS. *By Stephen A. Mitchell. New York: Oceana Publications, Inc. 1959. Price $2.75. Pages 123.*

When the Republican elephant and the Democratic donkey lie down together, it is time for the public to sit up and take notice!

In anticipation of an unprecedented campaign in the 1960 national election, Stephen A. Mitchell, former Chairman of the Democratic National Committee, has written a paper-back treatise on the art of vote getting, and Leonard Hall, former Chairman of the Republican National Committee, now chief political adviser to Richard Nixon, has come forward with an enthusiastic endorsement of the contents of the book, decrying (probably for the benefit of the South) the iniquitous one-party system as well as the domination of any political organization by small cliques (perhaps, the "old

guard") who emerge from secret sessions to announce "the Party's choices".

Chairman Mitchell's experiment began with the formation of a Democratic political club in his block on Elm Street "in a heavily Republican area of Chicago on a cold, raw Sunday afternoon in February, 1958". The purpose was to determine how much active interest could be generated in a neighborhood group of amateurs who might want to know more about the issues and the character of the leadership in each party, and who would be ready and willing to do some of the political chores of a campaign, but who would not wish to join the regular party organization.

The Elm Street Democratic Club was a success from the start. Neighbors who had not known each other were happy to have a chance to talk politics "on a low pressure and easy going social basis", and the permanent organization there formed furnished the pattern for the creation of similar clubs in many parts of the country. A complete layout for the formation and operation of such a club, with duties and programs, etc., is given in detail in part two of the 118-page volume printed in large type.

The influence of political clubs in the 1958 campaign is vividly recounted by the author and is nothing short of astonishing. The principal victims were the "regulars" and the professionals who found their organizations reclaimed by the independent voters. In state after state and city after city, the old order changed, and the successors, almost without exception, were of the highest integrity and civic usefulness. The factors causing the modern trend are many and varied and are analyzed by Chairman Mitchell in a chapter given over to that subject.

Mr. Mitchell truly says that, "as a hobby, politics simply has no competition"; but the game, fascinating as it is, soon becomes strictly business by the growing desire among young people to be more effective in political affairs. Thus, they become better informed. They learn to recognize the spurious propaganda of the demagogues, and often find themselves down in the arena fighting the battle of clean politics.

The spread of neighborhood political clubs throughout the United States, in advance of the November election, offers tremendous possibilities. A clear understanding of the paramount issues, with their world-wide implications, can bring the correct answers to questions of international policies, military defenses, economic growth and the like; and, most of all, can help Americans in greater numbers, to choose as our leaders, men and women who can be depended on to do what needs to be done to strengthen our unity and economy at home and broaden our sphere of influence abroad for the welfare and peace of all mankind.

WALTER CHANDLER
Memphis, Tennessee

BRIEF TO COUNSEL. *By Henry Cecil. New York: Harper & Brothers. 1959. $3.50 .*

If someone in the United States would write for the benefit of the young men who are considering the study of law a counterpart of Henry Cecil's *Brief to Counsel* and such a book could be distributed and read by those planning to enter law school, it is probable that a good many youngsters would take second thought before deciding upon law as a profession. The book is an informative and delightful account of the hard rows one who wants to become a barrister in England must hoe before he can become a junior barrister or when he attains eminence, takes the silk and becomes a Q. C. Mr. Cecil traces with apt anecdotes and illustrations the life of the student from the time he joins one of the Inns of Court, studies law for three years, takes six months' or a year's pupilage under a junior barrister if he can find a barrister who will accept him, devils for an older barrister, the equivalent in America of a junior partner or an associate doing the leg work for a senior partner, to the attainment of his own chambers when he awaits his first brief from a solicitor's managing clerk. At an appropriate point the student must decide whether he wants to practice common law or if he is going to the divorce Bar or the criminal Bar with a practice confined almost entirely to the divorce and criminal courts, or become a chancery barrister with less work in court and more paper work in chambers.

The organization of the British Bar with the strict dividing line between barristers and solicitors is very different from the situation in America where the scope of a lawyer's practice is largely self-imposed. According to the author the English Bar is said to be the strictest trade union in the country. The line of demarcation between a barrister and solicitor is so sharp that the author cautions a barrister against taking a case for a friend lest in some social meeting the barrister should trespass on the prerogatives of the solicitor.

The book has several chapters on court conduct and technique and since trials in England differ little from trials in America, the advice is equally good for the American practitioner.

Older lawyers, including those who saw the English courts in 1957, will greatly enjoy reading the book. A young man who is considering law as his vocation will profit from a reading. Many an oldster will wish that fees in America were arranged by clerks as in England.

ROBERT T. BARTON, JR.
Richmond, Virginia

EVIDENTIAL DOCUMENTS. *By James V. P. Conway. Springfield, Illinois: Charles C Thomas. 1959. $7.50. Pages 267.*

Evidential Documents is the newest book to be published on the subject of forged and disputed documents and is a credit indeed to the author, who is postal inspector in charge of the San Francisco Identification Laboratory and questioned document examiner for the United States Postal Inspection Service. In his book the author has packed into 267 pages an abundance of material designed to aid the practicing attorney, judge, investigator, and law enforcement officer who is confronted with a questioned document investigation or trial. Both the neophyte and experienced questioned document examiner will also want to purchase this book for their libraries.

In general arrangement *Evidential*

Documents is divided into thirteen chapters including: "Document Consciousness", "Evidential Signatures", "The Identification of Handwriting", "Handprinting and Numerals", "Handwriting Investigations—The Procurement of Exemplars"; "Typewriting", "Anonymous Letters"; "Graphology", "Writing Materials", "Miscellaneous Document Problems", "The Document Examiner" and "Expert Document Testimony".

Chapter I, "Document Consciousness", is an auspicious beginning for this book and should be required reading for every law school student, investigator and practicing lawyer. In it Mr. Conway has set forth a list of fifty suggestions on how the attorney or investigator, by a simple check list, may be able to uncover suspicious evidence of fraud in the documents that pass over his desk. When alerted to such evidence, he can then consult the services of a qualified questioned document examiner in order to verify or disprove his suspicions.

The chapters on "Handwriting", "Handprinting", and "Anonymous Letters" are also impressive in their content, being exhaustive studies of the matter of identifying unknown and anonymous writings from known specimens, including securing standards of comparison.

The chapter heading "Graphology" might lead one to believe that Mr. Conway had espoused the cause of interpreting character from handwriting. To the contrary, however, he cautions the attorney or others seeking the services of a document expert to beware of the graphologist or grapho analyst who attempts to testify about the character traits in a handwriting at issue. As an example, this type of pseudo-scientist will state that a short "t" crossing denotes cruelty and a double looped "a" reflects deceit, etc., and attempt to make an identification on such nebulous evidence.

While generally condemning this type of handwriting "analysis", Mr. Conway suggests that one must not rule out all evidences of personality in handwriting, since writing, like a person's walk, talk, dress and gestures, is a manifestation of that individual's physical and mental makeup. In that connection he suggests that all writings be examined for signs of nervousness, marks of lack of mental or manual control, incoherence, unpredictability, exhibitionism, timidity or carelessness or old age. All of these may be of value when comparing an unknown writing with known specimens.

In the concluding chapter on "Expert Testimony", Mr. Conway offers many excellent suggestions on the trial of a case involving questioned documents. Included in this discussion is a series of qualifying and direct examination questions which he has personally used in court appearances.

In discussing the status of questioned document testimony in the legal picture as a whole, Mr. Conway takes sharp issue with the legal definition "Opinion Evidence" applied to testimony of document experts. The term, he states, is outmoded and frequently used by those opposing the facts to suggest to the judge or jury that the document expert's testimony is "merely an opinion", when in fact this testimony is frequently of the most compelling and demonstrable kind. Contrasted to much expert testimony, the document examiner is able to give detailed reasons for the opinion he has expressed and to illustrate them with photographic comparison charts. Since this evidence is susceptible of such a high degree of demonstration, the incidence of document examiners opposing each other in court is exceedingly small when contrasted to some areas of medical testimony where oppositions are the rule rather than the exception. Mr. Conway suggests that a more descriptive term for questioned document testimony should be "expert evidence", although this reviewer would add to this description the term "scientific".

The only real criticism of *Evidential Documents* that can be offered is that the author tends to use rather cumbersome sentence structure in various portions of the book together with words that require reference to the dictionary for definition.

Throughout the book the author has illustrated many of his statements with excellent photographic material. The index, while not as complete as some might desire, is adequate for a book of this type which is obviously not intended to cover in detail all possible ramifications of the subject.

DONALD DOUD

Milwaukee, Wisconsin

THE PAROLE PROCESS. *By G. I. Giardini. Springfield, Illinois: Charles C Thomas. 1959. $12.50. Pages 458.*

The author has divided this practical book into three main aspects of parole service: first, preparation of prisoners for parole; second, selection for parole; and finally, supervision after release. Dealing throughout with the composite of institutional ends that must be served, as well as the complex of substantive social ends, the preface advises that the volume is primarily concerned with parole, but much of the material may be applied to the field of probation as well.

The first chapter is confined to the origin and development of parole. He develops the parole system from its inception and gives the earliest forms of punishment and the ingenious devices perpetrated upon those who were criminally bent. This chapter then continues with the development of parole in the United States, and the author gives a general review of the parole systems in the United States. At the end of each chapter, brief references are submitted for the text.

It is pointed out that all students of penology agree that the purpose of any penal program is to protect society. However, the best way to protect society is to improve the potentialities of the prisoner to take on social responsibilities. This protection may be initiated almost immediately within the institution by means of the classification process which is divided into three stages:

1. A complete and thorough case study;
2. Classification;
3. Carrying out the program.

The case study could most effectively take place before sentencing. However, there are very few courts equipped with the proper personnel to accomplish this, whereas the great majority of prisons, reformatories and schools

for the rehabilitation of juvenile delinquents do have such facilities. Discovering the character of an inmate and an analysis of his criminal act becomes a perilous process without the benefit of his complete life picture.

Upon entrance to the institution, the inmate should be thoroughly examined by clinically oriented personnel who are skilled in eliciting meaningful histories that may be used beneficially by those charged with parole release. Mr. Giardini recommends strongly that the classification process should be a continuing one with reclassification studies made from time to time. The report of the group on classification should then recommend and prescribe the type of treatment and vocational occupation that the inmate may pursue within the institution. The writer points out that without a thorough classification study, it would be impossible to diagnose the cause of the subject's previous failures and to prescribe the necessary treatment.

A health record and examination is also important, inasmuch as a physical disorder may be directly or indirectly associated with the criminal act. The author devotes an entire chapter to the preparation of the classification and reclassification summaries and provides a helpful step by step process of the minimum requirements that the classification summary should contain. The form and content of this summary in effect would give full information of the subject from birth to the time of preparation of the classification report.

Throughout this book the author emphasizes that the protection of society is paramount and should constitute the basic criterion for release on parole. The writer advises that the statistics have shown that age at the time of the first arrest has some bearing on parole success. In general, the younger was the offender at the time of the first arrest, the poorer are his chances for adjustment on parole; that the earlier a pattern of behavior is established in the life of the individual, the more ingrained it becomes and the more difficult it is to remove it or to replace it with a more desirable pattern. This points up the importance of looking into the early history of the offender before making a decision for parole selection. This bears out the importance of thorough and investigative classification reports. The progress of an inmate while in the institution as to his conduct in prison, vocational pursuits and prison work record, his educational achievements, together with personality changes and development should be a subject of thorough study by the parole authority.

The author also discusses the rare occasions when a prisoner does not wish to be paroled. The prisoners who have only a short time on their sentence until discharge may prefer to serve the short time rather than being placed under the restrictions of parole. This type resents surveillance. There are others for various reasons who have developed an abnormal fear of the outside. The author states that there is merit in the idea advanced by some workers in the field of parole that in these cases some parole should be imposed and that it certainly should be imposed upon those prisoners who prefer prison to liberty because they wish to evade facing reality.

Mr. Giardini advises that in addition to the protection of society, another criterion for parole selection is the question, "In what manner is the community ready to accept the prisoner?" A parole board must find out the family's attitude toward the subject and their competence in helping him while under supervision. The attitude of the trial judge, the state's attorney, and the local police should be taken into consideration. The author, however, does point out that there could be community bias, and notes that certain sex offenses are particularly prone to arouse public indignation.

The author feels that the members of the custodial force within the prison should also be given the opportunity to make their observations of the inmate and that their observations record should be available to the parole board. A system of prompt and systematic recording should be made by the custodial group. It is felt that this is of importance since the observations made by the psychiatrist, psychologist, the social worker and so forth are usually on a face-to-face basis, whereas those in charge of the vocational schools and work groups may be in a position to observe and make recordings when the inmate does not know that he is being observed.

The author points out the various methods that a parole officer has in the matter of interviewing and in obtaining the best possible rapport between the officer and the inmate or parolee. An entire chapter is devoted to case recording and how the officer in the field should record all of the contacts made with the parolee. Actual recordings are shown in this chapter illustrating the good form of recording as against the less desired form.

The enforcement in parole supervision is thoroughly discussed as well as what limits should be placed upon a parole officer's authority to make arrests for those whom he finds in dereliction of the parole rules. A form of the rules, regulations and conditions governing parole used by the Pennsylvania Board of Parole is also set forth.

Some of the common problems of supervision are discussed, such as financial problems, employment problems, marital problems, health problems, etc., and the author sets forth useful observations in dealing with this type of problems of the parolee in the free community.

The interstate supervision of parolees and the history of the enactment of this legislation is gone into thoroughly. A chapter is devoted to the training of parole officers and sets forth the minimum requirements of educational background that should be required of parole officers.

The volume is completed with a chapter devoted to a blueprint for a model parole system incorporating the previous divisions of the text. It is interesting to note that the author states that the task of selecting prisoners for parole, even under the most favorable conditions, remains largely a practical, common sense process which becomes more refined and exact with the increasing experience of the operators. It is the author's hope that his book will contribute to the material so badly needed in the training of correctional workers. Certainly Mr. Giardini's desire is accomplished by this volume.

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FOREIGN LAW: A GUIDE TO PLEADING AND PROOF. *By Otto C. Sommerich and Benjamin Busch. New York: Oceana Publications, Inc. 1959. $5.00. Pages 170.*

All lawyers interested in comparative and foreign law are undoubtedly familiar with the excellent volumes that have been published under the sponsorship of the Parker School of Foreign and Comparative Law of Columbia University. The most recent monograph to enjoy such sponsorship is *Foreign Law: A Guide to Pleading and Proof.* Written by two experienced and distinguished members of the New York Bar, it adheres to the high standards of scholarship and utility that are characteristic of its predecessor volumes.

Although entitled *Foreign Law* this book actually covers an important and interesting phase of American procedural law. In addition to many valuable suggestions, addressed primarily to the trial lawyer, the book deals specifically with the manner in which the law of a foreign country is pleaded and proved in the American courts.

The reader is informed at the very outset that the subject matter of the book should not be solely of interest to scholars. Since many instances could be cited wherein litigants have lost substantial rights because of the failure properly to plead and prove foreign law, clearly the book deals with certain important practical problems frequently encountered in the practice of law.

The authors admonish the reader that it would be a mistake for the lawyer to assume that the problems inherent in the pleading and proof of foreign law may be delegated to a "foreign law expert".

> The burden is always upon the practising lawyer to reduce the concepts of foreign law to statements of ultimate fact for the purpose of pleading, whether in common law, code or Federal court forms. He must know what to ask for by way of particularization and how to ask for it. He must collect foreign documents and foreign legal literature and obtain authentications and certifications that comply with governing procedure. He must interview foreign experts, study their qualifications and integrate their knowledge into forms and elements familiar to our American courts. Lastly, he must present the entire fabric of his foreign law case to the courts and, sensitive to any possible prejudice against foreign concepts and institutions, he must be adequately prepared to overcome it.[1]

Although the book also discusses the important roles of the judge and the expert witness, clearly the function that is most thoroughly treated is that of the practicing lawyer.

The reader who may have forgotten the introductory lectures in his law school course on the conflict of laws will be surprised to learn that the courts of England "at first refused to apply any law other than the law of England".[2] It was not until 1745 that Lord Mansfield announced that "the law of England says, that in a variety of circumstances with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern".[3] With certain modifications the United States adopted the "fact theory" established in England, that foreign law "must be pleaded and proved by the party who has the affirmative of the issues on the merits".[4]

The book is not concerned with the intricate and perplexing problems of the conflict of laws dealing with choice of law. Its references to choice of law matters serve merely to illustrate the underlying problem.

The principal value of the book stems from the lucid manner in which it sets forth the methods and techniques used in pleading and proving foreign law, and in the suggestions that it makes for the examination and cross-examination of expert witnesses. Although the book cites a tremendous number of New York cases it should not be assumed that its utility is confined to New York lawyers. The predominence of New York citations is "to be expected", say the authors, "since the majority of cases involving foreign law have arisen in New York State".[5]

The New York practitioner will find the book especially helpful because of its thorough treatment and evaluation of Section 344 (a) of the Civil Practice Act pursuant to which the courts of New York State may take judicial notice of foreign law.

A valuable table that will be appreciated by all readers is found in Appendix C of the book. This appendix indicates the specific statute or the system that prevails in every state of the union governing the judicial notice of foreign law. For example, next to Alabama there is the notation "common law prevails" whereas next to West Virginia there appears "West Virginia Code, Section 5711, Judicial Notice of Foreign Law. Court may consult any book, document, testimony, information or argument that is offered."

In an attempt to make the book a complete handbook on the subject of foreign law, the authors have included, in an appendix, the complete judicial opinions in several important cases which contain "the basic law on the subject". The cases are *Cuba Railroad Co.* v. *Crosby*, 222 U.S. 473 (1912), *Walton* v. *Arabian American Oil Company*, 233 F. 2d 541 (1956), *Arams* v. *Arams*, 182 Misc. 328 (1943), and *Arams* v. *Arams*, 182 Misc. 336 (1943). Appendix B reproduces verbatim the appropriate sections of the New York Civil Practice Act and the Uniform Judicial Notice of Foreign Law Act. The book concludes with an evaluation of the American procedures for the proving of foreign law and sets forth the views of such authors as Professors Nussbaum and McCormick who have written widely on the subject.

Foreign Law: A Guide to Pleading and Proof is the type of monograph that by virtue of its brevity, clarity and interesting subject matter, can be read with great profit by all lawyers and judges. There is no doubt that it is the kind of book that the practicing lawyer will want to reread when he is confronted with any of the problems relative to the pleading and proof of foreign law.

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1. Page 2.
2. Page 12.
3. *Nelson* v. *Bridgeport*, 8 Beav. 527, 536, 50 Eng. Rep. 207, 211 (1845).
4. Page 12.
5. Page 3.

Review of Recent Supreme Court Decisions

George Rossman
EDITOR-in-CHARGE

Admiralty . . . *application of state law*

Hess v. *United States*, 361 U. S. 314, 4 L. ed 305, 80 S. Ct. 341, 28 Law Week 4058. (No. 5, decided January 18, 1960.) *On writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Judgment set aside and cause remanded.*

This action, brought under the Federal Tort Claims Act, sought to recover from the United States for the death of petitioner's decedent who was drowned in the course of his employment as a carpenter foreman for a construction company repairing Bonneville Dam, in Oregon, a property owned by the Government.

Since the death had occurred on navigable waters, it was asserted that the case was governed by admiralty principles. Although there is no right of action for wrongful death at admiralty, a line of cases beginning with *The Harrisburg*, 119 U. S. 199, permits application of state wrongful death statutes when death results from a maritime tort committed on navigable waters within the state. In this case, Oregon had a general wrongful death statute and an "Employers' Liability Law" which provides liability for wrongful death for failure to "use every device, care and precaution which it is practicable to use for the protection and safety of life and limb . . ."

Bringing his action in a federal district court, the petitioner at first alleged liability under both Oregon statutes. The District Court held that there was no liability under the general wrongful death act because the death was not "caused by negligence of the United States or its employees", and that there was no liability under the Employers' Liability Act because the high standards of care imposed by that statute would be unconstitutional if applied in admiralty cases. The Court of Appeals affirmed. Before the Supreme Court, petitioner abandoned his contention that the general wrongful death act applied, leaving as his sole claim the argument that he was erroneously deprived of the opportunity to invoke the Employers' Liability Law.

Mr. Justice STEWART, speaking for the Court, held that there was nothing unconstitutional in applying the Employers' Liability Law. In an action for wrongful death in state territorial waters, the Court reasoned, the conduct that gives rise to liability is to be measured by the substantive standards of the state law, not by admiralty's standards of duty. "It would be an anomaly to hold that a State may create a right of action for death, but that it may not determine the circumstances under which that right exists" the Court said, quoting *The Tungus* v. *Skovgaard*, 358 U. S. 588, decided last term. "The power of a State to create such a right includes of necessity the power to determine when recovery shall be permitted and when it shall not."

The Court said that it was leaving open the question "whether a state wrongful death action might contain provisions so offensive to traditional principles of maritime law that the admiralty might decline to enforce them". The present case presented no such problem, it declared.

The CHIEF JUSTICE, Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice BRENNAN noted that they joined in the Court's opinion "solely under compulsion" of *The Tungus* v. *Skovgaard*, noting their continued disagreement with that decision and reserving their position whether it should be overruled.

Mr. Justice HARLAN, joined by Justice FRANKFURTER, wrote a dissenting opinion which drew a distinction between state wrongful death statutes which merely gave a right to damages for wrongful death for conduct that is tortious under federal (maritime) law and state statutes, like the one here, which impose a duty of care that goes far beyond the duty imposed by maritime law.

Mr. Justice WHITTAKER noted his concurrence with Mr. Justice HARLAN's dissent "Except for its implication . . . that maritime torts committed on the navigable waters of a State . . . are governed by the general substantive tort law of the State—not by the general federal maritime law as remedially supplemented only by the State's Wrongful Death Act".

The case was argued by Cleveland C. Cory for petitioner and by Alan S. Rosenthal for respondent.

Admiralty . . . *application of state law*

Goett v. *Union Carbide Corporation*, 361 U. S. 340, 4 L ed. 2d 341, 80 S. Ct. 357, 28 Law Week 4090. (No. 3, decided January 18, 1960.) *On writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Judgment vacated and cause remanded.*

This case involved issues similar to those in No. 5, *supra*.

The petitioner brought a libel in admiralty to recover damages for the death of her decedent who was drowned while engaged in repairing respondent's barge in the navigable waters of the Kanawha River in West Virginia. The petitioner relied upon West Virginia's Wrongful Death Act, alleging unseaworthiness of the barge or, in the alternative, negligence. The District Court found that the respondent was negligent and awarded $20,000 damages, the statutory maximum. The Court of Appeals reversed, holding that respondent owed no duty at the time to petitioner's decedent and further that the vessel was not unseaworthy. The case was decided before the Supreme Court handed down its decision in *The*

Reviews in this issue by Rowland Young.

Tungus, cited *supra* in connection with No. 5.

Speaking *per curiam*, the Supreme Court announced that it was vacating the judgment because it was unclear how the Court of Appeals had viewed the West Virginia statute. The lower court, the decision declared, "seems . . . likely to us to have passed on the negligence issue as a matter of federal maritime law . . . and so in the absence of any expression by it . . . we do not believe we can permit its judgment to stand after our intervening decision in *The Tungus*".

Mr. Justice HARLAN, joined by Mr. Justice FRANKFURTER, dissented on the ground that there was "no reasonable basis" for concluding that the Court of Appeals' disposition of the negligence cause of action did not rest upon state substantive law, and further that there had been no occasion for the Court of Appeals to consider whether the West Virginia Wrongful Death Act embraced a cause of action for unseaworthiness in view of its finding that the vessel was not unseaworthy.

Mr. Justice WHITTAKER wrote a dissenting opinion which stressed his view that state wrongful death acts do not govern maritime cases involving wrongful death but merely provide a remedy for death resulting from an act made wrongful by other laws. Maritime law, in this view, governed the "real and substantive right" in the suit.

Mr. Justice STEWART wrote a dissenting opinion which argued that the Court of Appeals had clearly applied West Virginia law, and even if it had not there was no showing that West Virginia law was in any way more favorable to the petitioner than the general maritime law and so that a remand was pointless.

The case was argued by Harvey Goldstein for petitioner and by Charles M. Love for respondent.

Constitutional law . . .
court-martial of civilians

Kinsella v. *United States* ex rel. *Singleton*, 361 U. S. 234, 4 L. ed. 2d 268, 80 S. Ct. 297, 28 Law Week 4073. (No. 22, decided January 18, 1960.) *On appeal from the United States District Court for the Southern District of West Virginia. Affirmed.*

This decision, along with its companions, determined that civilians cannot be tried by courts martial in peacetime.

The case began with an application for habeas corpus filed by the mother of the wife of a soldier stationed in Germany. The wife and her soldier husband had been tried by court martial and pleaded guilty to involuntary manslaughter under Article 119 of the Uniform Code of Military Justice. They received the maximum penalty. The convictions were upheld by the Court of Military Appeals and the wife was returned to the United States and placed in the Federal Reformatory for Women at Alderson, West Virginia. The District Court granted the petition for habeas corpus and ordered the release of the prisoner. The warden appealed.

Mr. Justice CLARK delivered the opinion of the Supreme Court affirming. The Court recalled its decision in the second *Covert* case—*Reid* v. *Covert*, 354 U. S. 1 (1957)—which held that civilian dependents stationed overseas with the Armed Forces cannot be tried by court martial for capital offenses. The question whether civilian dependents could be tried in military courts for non-capital offenses was left undecided.

The Court held that the wife was entitled to the protection of Article III and the Fifth and Sixth Amendments and held unconstitutional the provisions of Article 2(11) of the Uniform Code of Military Justice which provide for court-martial jurisdiction over civilians. The Court said that trial by court martial "was the exercise of an exceptional jursidiction springing from the power granted the Congress in Art. I, § 8, cl. 14, "to make Rules for the Goverment and Regulation of the land and naval Forces". The test for court-martial jurisdiction, the Court went on, is one of *status*, whether the accused in a court martial is a person who can be regarded as falling within the term "land and naval Forces". Under the theory of the second *Covert* case, civilian dependents did not fall within that definition. The Court could find no justification for a distinction between capital and non-capital offenses, noting that no such distinction is made in the Fifth and Sixth Amendments, or in Article III of the Constitution.

The Court also refused to hold that the necessary and proper clause could validate the military trial of a civilian.

The case was argued by Harold H. Greene for appellant and by Frederick Bernays Wiener for appellee.

Constitutional law . . .
court-martial of civilians

Grisham v. *Hagan*, 361 U. S. 278, 4 L. ed 2d 279, 80 S. Ct. 310, 28 Law Week 4080. (No. 58, decided January 18, 1960.) *On writ of certiorari to the United States Court of Appeals for the Third Circuit. Reversed.*

This was a companion case to No. 22, *supra*, involving a civilian employee of the Army sentenced in France by a court martial to life imprisonment for murder. He filed a petition for a writ of habeas corpus which was denied, and the denial was affirmed by the Court of Appeals.

The Supreme Court reversed, speaking through Mr. Justice CLARK. The Court rejected the Government's distinctions between civilian dependents and civilian employees and held that the *Covert* decision was decisive here.

The case was argued by Charles Wolfe Kalp and Frederick Bernays Wiener for petitioner and by Oscar H. Davis for respondent.

Constitutional law . . .
court-martial of civilians

McElroy v. *United States* ex rel. *Guagliardo*, *Wilson* v. *Bohlender*, 361 U. S. 281, 4 L. ed. 2d 282, 80 S. Ct. 305, 28 Law Week 4078.(Nos. 21 and 37, decided January 18, 1960. *No. 21 on writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Affirmed. No. 37 on writ of certiorari to the United States Court of Appeals for the Tenth Circuit. Reversed.*

These were companion cases to Nos. 22 and 58, and dealt with the problem of court-martial of civilians stationed overseas with the Armed Forces. In No. 21, the respondent was a civilian employee of the Air Force, hired as an electrical lineman, who was convicted by court martial in Morocco of larceny and conspiracy to commit larceny. The District Court refused to issue a writ

of habeas corpus to secure his release from the Disciplinary Barracks at New Cumberland, Pennsylvania, and the Court of Appeals reversed. In No. 37, the petitioner was a civilian auditor employed by the Army in Berlin who was convicted of sodomy by a court martial. The District Court dismissed his petition for habeas corpus; the Supreme Court granted certiorari prior to argument of the appeal in the Court of Appeals.

Mr. Justice CLARK, again speaking for the Court, held that the cases were controlled by Nos. 22 and 58. The Court said that the materials supporting prosecution of sutlers and other civilians by courts martial were "too episodic, too meager, to form a solid basis in history, preceding and contemporaneous with the framing of the Constitution, for constitutional adjudication". Cases supporting court-martial of paymasters in the Navy were said to be inapposite since a paymaster's position is "an important one in the machinery of the navy" and paymasters agreed in writing to submit to the laws and regulations for government and discipline of the Navy.

The Court suggested that the Armed Forces might induct or enlist employees with needed skills into the Service or adopt a procedure similar to that used by the Navy for paymasters if it was necessary to maintain court-martial jurisdiction over its employees stationed overseas.

Mr. Justice HARLAN, joined by Mr. Justice FRANKFURTER, wrote an opinion dissenting in Nos. 22, 21 and 37, involving non-capital offenses, and concurring in No. 58, which involved a capital offense. This opinion expressed disagreement with the Court's ruling that the second *Covert* case should be applied to non-capital cases and argued that a distinction could be drawn that would permit court martial for non-capital crimes. The opinion also criticized the court's definition of military jurisdiction in terms of status. The question should be, not whether the accused was actually a member of the military, the opinion said, but how close his relationship was to the military establishment.

Mr. Justice WHITTAKER, joined by Mr. Justice STEWART, wrote an opinion which argued that civilian *dependents* should be treated differently from civilian *employees*. Under this view, while dependents would not be subject to court-martial jurisdiction, employees would. The reasoning was that Clause 14 does not limit Congress to the making of rules for the government and regulation of members of the Armed Forces, but includes power to regulate "all persons so closely related to and intertwined with those forces as to make their government essential to the government of those forces". This opinion, however, agreed with the Court that no distinction could be found between capital and non-capital offenses.

In No. 21, the case was argued by Oscar H. Davis for petitioners and by Michael A. Schuchat for respondent.

In No. 37, the case was argued by Frederick Bernays Wiener for petitioner and by Harold H. Greene for respondent.

Fair Labor Standards Act . . . *unpaid wages*

Mitchell v. *Robert DeMario Jewelry, Inc.*, 361 U. S. 288, 4 L. ed. 2d 323, 80 S. Ct. 332, 28 Law Week 4066. (No. 39, decided January 18, 1960.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Reversed and remanded.*

This case involved two sections of the Fair Labor Standards Act of 1938, Section 15(a)(3), making it unlawful for an employer covered by the act "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this act . . ."; and Section 17, which gives Federal District Courts power to restrain violations of Section 15, provided that they have no jurisdiction "in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages . . ."

This action was brought by the Secretary on behalf of three of respondent's employees to recover wages lost when the employees were discharged because they went to the Secretary for help in obtaining wages unpaid in violation of other sections of the act. The District Court granted an injunction ordering reinstatement of the employees but it reserved the question whether it had jurisdiction to order reimbursement of the lost wages, declining to order reimbursement in the exercise of its discretion. The Court of Appeals held that the District Court lacked jurisdiction to order reimbursement in view of the language of Section 17, holding that to be upheld that jurisdiction "must be expressly conferred by an act of Congress or be necessarily implied from a congressional enactment".

The Supreme Court reversed, speaking through Mr. Justice HARLAN. Holding that the court below had applied the wrong criterion, the Court declared that, in granting the District Court equitable jurisdiction, Congress had given it "all the inherent equitable powers . . . for the proper and complete exercise of that jurisdiction". The language of Section 17, disabling courts from awarding "unpaid minimum wages", etc., the Court pointed out, was added in 1949 to reverse the effect of *McComb* v. *Frank Scerbo & Sons*, 177 F. 2d 137, which held that in a suit brought under Section 17 by the Secretary, the court had power to order reimbursement of unpaid overtime wages. The Congress felt, the Court explained, "that the Secretary should not lend his weight to, nor be burdened with, actions for unpaid wages except in the clearest cases"; hence, the amendment, which left it to the employees themselves to bring an action for recovery of unpaid overtime wages under Section 16. There was nothing in act or its history, the Court declared, to show that Congress intended the proviso to have a wider effect, or that it should apply to suits for the recoupment of lost wages as distinguished from underpayments.

Mr. Justice DOUGLAS noted that, while he joined the Court's opinion, he agreed with Mr. Justice WHITTAKER that other remedies were available and that any remedy obtained in an equity action was complementary to them.

Mr. Justice WHITTAKER's dissenting opinion was concurred in by Mr. Jus-

tice BLACK and Mr. Justice CLARK. The dissent read the 1949 amendment as foreclosing awards of all kinds of back wages in suits for injunctive relief brought by the Secretary. Under this interpretation, Congress intended to allow recovery of unpaid wages only in an action at law, triable by a jury, under Section 16.

The case was argued by Bessie Margolin for petitioner and by R. Lamar Moore for respondents.

Employers' Liability Act . . . *negligence*

Davis v. *Virginian Railway Company*, 361 U. S. 354, 4 L. ed. 2d 366, 80 S. Ct. 387, 28 Law Week 4098. (No. 53, decided January 25, 1960.) *On writ of certiorari to the Supreme Court of Appeals of Virginia. Reversed and remanded.*

In this negligence case under the Federal Employers' Liability Act, petitioner made two claims: first, that he was injured while spotting railroad cars on his employer's tracks, the negligence consisting of requiring the spotting of the cars at accelerated speed with only the help of inexperienced brakemen; and, second, improper treatment by the physician furnished by the respondent which aggravated the injury.

The case was tried to a jury, but at the close of the case, the trial judge sustained respondent's motion to strike petitioner's evidence and discharged the jury. The Virginia Supreme Court of Appeals rejected a petition for writ of error.

Mr. Justice CLARK reversed for the Federal Supreme Court, which held that the issue of negligence as to the injury should have been submitted to a jury, but that the evidence was insufficient to support the malpractice claim. The evidence indicated that petitioner was supposed to spot forty-three cars during a thirty-minute period with the assistance of two brakemen, the senior of whom had never spotted cars at the plant before and the other had spotted cars there "for only a short period". There was testimony that the minimum time for completion of the job was fifty minutes and in addition, that the inexperience of his assistants required petitioner to take a position on top of the cars whereas normally he would have been on the ground. All this, said the Court, was enough to indicate that there was a question of negligence for the jury. As for the malpractice claim, however, the Court noted that the company physician was of unquestioned qualification and treated the petitioner according to his best medical judgment and long practice. The only evidence to the contrary, an evaluation by another physician, was offered without proper foundation as to the proper medical standard for treatment of petitioner's injuries, the Court noted.

Mr. Justice FRANKFURTER noted that he was of the view that certiorari should have been dismissed as improvidently granted for the reasons set forth in his opinion in *Rogers* v. *Missouri Pacific Railroad Company*, 352 U. S. 500.

Mr. Justice WHITTAKER wrote an opinion which agreed with the rejection of the malpractice contention, but dissented as to the evidence of negligence. In his view, there was nothing in the record to indicate that petitioner had been told to complete the spotting in thirty minutes and both his assistants had had at least a year's experience. The opinion also saw no act of omission or commission on respondent's part that could be considered negligent.

Mr. Justice HARLAN wrote a dissenting opinion which argued that the record was bare of anything showing why the accident occurred and that "On the basis of the criteria governing our certiorari jurisdiction, this case has not been profitable business for this Court".

The case was argued by Henry E. Howell, Jr., for petitioner and by Thomas R. McNamara for respondent.

Judgments . . . *mootness*

Local No. 8-6, Chemical and Atomic Workers International Union v. *Missouri*, 361 U. S. 363, 4 L. ed. 2d 373, 80 S. Ct. 391, 28 Law Week 4095. (No. 42, decided January 25, 1960.) *On appeal from the Supreme Court of Missouri. Vacated and remanded.*

In this appeal from a judgment of the Missouri Supreme Court upholding the constitutionality of that state's King-Thompson Act, the Court vacated the judgment and remanded on the ground that the case was moot.

The King-Thompson Act authorizes the Governor of Missouri to take possession of and operate a public utility affected by a work stoppage when in his opinion "the public interest, health and welfare are jeopardized". The Governor had seized possession of the Laclede Gas Company, which sells natural gas in the St. Louis area, after a strike by its workers. The Circuit Court of St. Louis enjoined continuance of the strike and held the King-Thompson Act constitutional. The strike terminated the day after the injunction issued and the Governor ended the seizure several weeks later.

The Supreme Court of Missouri, although noting that the injunction had "expired by its own terms" nevertheless proceeded to consider some of the merits of the controversy when the appellant labor unions appealed. The state court held that the sections of the King-Thompson Act "directly involved" were constitutional. These sections were the portions of the statute making a strike unlawful after seizure by the Governor and giving the state courts power to enforce provisions of the statute.

In an opinion written by Mr. Justice STEWART, the Federal Supreme Court declared that since the injunction has long since " 'expired by its own terms,' we cannot escape the conclusion that there remain for this Court no "actual matters in controversy essential to the decision of the particular case before it." The Court cited *Harris* v. *Battle*, 348 U. S. 303, as dispositive of the issue, refusing to distinguish the two cases on the ground the statute in question here, unlike that in Virginia, imposes monetary penalties on unions that continue to strike after seizure and provides for loss of seniority of employees who participate in such a strike. The state court had not passed on these issues, the Court said, and it had noted that they were separable from the rest of the statute. Although a suit asserting the monetary penalties against the union was pending in the state courts, the Court declared that this did not give life to the present appeal.

(Continued on page 316)

What's New in the Law

The current product of courts, departments and agencies

George Rossman · EDITOR-IN-CHARGE

Richard B. Allen · ASSISTANT

Antitrust Law . . .
railroads v. trucks

With Chief Judge Biggs strongly dissenting, a three-judge panel of the Court of Appeals for the Third Circuit has just as vigorously affirmed a sizeable antitrust award in favor of a truckers' trade association and against a group of railroads.

Forty-one long distance trucking companies and their trade association, the Pennsylvania Motor Truck Association, sued twenty-four eastern railroads, the Eastern Railroad Presidents' Conference and Carl Byoir & Associates, a New York public relations firm. The complaint alleged violations of §§1 and 2 of the Sherman Act, 15 U.S.C.A. §§1 and 2, and asked for injunctive and treble-damage relief under §§4 and 16 of the Clayton Act, 15 U.S.C.A. §§15 and 26. The damages were claimed to have resulted to the long-haul trucking industry from the concerted campaign of the railroads—carried on by advertising, a spurious third-party apparatus and pressures on legislatures and governors— to monopolize freight hauling in interstate commerce by holding the truckers up to public ridicule and ill-will and by fostering inimical state legislation.

The district judge held for the truckers. He rejected the contention that the entire campaign was a perfectly legitimate public relations campaign for legislation. He held the campaign had another and more important phase of "vilification designed to destroy the good will of the long-haul trucking industry". He found an antitrust conspiracy and awarded $217,358 (trebled to $652,074) to the trade association, but only nominal damages of six cents (trebled to eighteen cents) to each of the trucking firms. Plaintiffs' counsel fees of $200,000 were assessed against the defendants.

Affirming, the Third Circuit termed the district judge's conclusions "soundly based on substantial evidence" and declared the "anti-trust conspiracy completely established against all the defendants". The evidence showed, the Court continued, "both legal and illegal methods to obtain the illegal objective of injuring and/or destroying the long-haul trucking industry. It shows injury to the plaintiffs and to the public."

In his dissenting opinion, Judge Biggs contended that there was no cognizable offense under the Sherman Act and added that if the interpretation placed on the antitrust laws by the majority was correct, the First Amendment rights of the defendants to freedom of petition "will be unduly limited and to an extent at least, destroyed". He declared that the Sherman Act was not intended by Congress to be applicable to governmental restraints arising from legislation, whether or not the legislation was induced by private activity, and that the private activities shown in this case could not be deemed unreasonable restraints or monopoly under the Act. If this were not true, he said, serious constitutional questions would arise, including a question under the Tenth Amendment of reserved powers of states to act legislatively upon information and petitions from those affected by the legislation. "If persons are to be deprived of the right to petition because that right has been subject to abuse, liberty visibly will take flight", he asserted.

(Noerr Motor Freight, Inc. v. *Eastern Railroad Presidents Conference,* United States Court of Appeals, Third Circuit, December 10, 1959, *per curiam.)*

Attorneys . . .
disciplinary powers

Splitting four to three, the Supreme Court of Florida has decided that a circuit judge in Dade County (Miami) has power to appoint an investigatory committee of local lawyers to inquire into improper solicitation of personal cases within the jurisdiction of the court, but it thought the committee was free-wheeling a bit too much.

The Court ruled that the ancient powers of circuit courts in the field of professional discipline had been preserved throughout the changes in Florida which have resulted in a constitutional provision placing exclusive jurisdiction over bar discipline in the Supreme Court and in a rule integrating the Bar and giving the Florida Bar some disciplinary functions. The Court reasoned that since the circuit judge had power to disbar he also had power to delegate investigatory functions to a bar committee.

The challenge to the circuit judge's power came from an attorney who was required by subpoena to produce his check books and bank records for a two-year period. The Court thought this was a little too broad. It was also disturbed by the allegation that the committee had subpoenaed several clients of the lawyer and that the clients had been questioned by the committee, some of whom were attorneys for the defendant in pending cases.

The Court set up three requirements for the operation of the committee: (1) all witnesses should be informed whether they are under investigation, and if so, the nature of the charges should be explained, so they might determine pertinency of the questions and any constitutional right to decline to answer; (2) subpoenas to produce

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

documents should be limited to those germane to the investigation; and (3) any member of the committee who represents clients involved in any matter under investigation should disqualify himself.

The three dissenters criticized the investigation as based only on gossip and newspaper reports; they referred to it as a "shotgun" and "dragnet" procedure. They declared the right of a circuit judge to appoint such a committee should be limited to cases sanctioned by the Supreme Court and in which specific charges have been filed.

(Petition of Dade County Bar Association Special Committee, Supreme Court of Florida, November 25, 1959, Drew, J., 116 So. 2d 1.)

Conflict of Laws . . . *husband-wife actions*

The Supreme Court of New Hampshire has ruled that a wife may maintain a suit in New Hampshire against her husband for damages arising from a Massachusetts automobile accident alleged to have been caused by the husband's gross negligence.

New Hampshire law permits a married woman to maintain an action against her husband for damages suffered during coverture as a result of the husband's illegal acts, including negligent acts. The accident in the instant case occurred in Massachusetts, where no such suit is permitted. But the parties were not married at the time of the accident; they were married subsequently in Arkansas.

The Court noted that recent developments indicate support for the view that inter-spousal suits should be determined in accordance with the law of the state of domicile of the parties, regardless of the jurisdiction in which the wrong was committed. But because the parties had not raised the point, it declared it would not consider changing New Hampshire's doctrine that the law of the place of the tort governs. Turning then to Massachusetts law, the Court declared that that state's rule was that where the tort was committed before marriage of the parties, the marriage did not operate to deprive the wife of her cause of action, but only prevented her from enforcing it in Massachusetts. It concluded that Massachusetts law did not extinguish the pre-existing cause of action, and that it was not extinguished under either the law of Arkansas, where the marriage was performed, or New Hampshire, where the domicile was at all times.

(Morin v. *Letourneau*, Supreme Court of New Hampshire, December 1, 1959, Duncan, J., 156 A. 2d 131.)

Constitutional Law . . . *Sunday closing laws*

A judge of the Superior Court of New Jersey, Law Division, has ruled that a 1959 Sunday-closing statute is valid.

Enactment of the present statute followed a 1958 act which was declared unconstitutional because its population limitations precluded it from applying to three of the state's counties. The 1959 enactment was the same in prohibiting the sale of certain merchandise on Sunday and providing penalties for violation, but the population limitation was eliminated. In its place was provision for a referendum in each county on petition of 2,500 registered voters as to whether the statute should become "operative" in the county. Under this procedure the law had been voted into effect in twelve counties.

The case was also decided against the background of an older New Jersey statute which prohibits "wordly employment or business, except works of necessity and charity" on Sunday, but from which penalty provisions were removed in 1951, rendering the statute only a declaration of public policy. Under judicial interpretation this statute has afforded a basis for municipalities to adopt their own Sunday-closing ordinances. The Court ruled that the 1959 law and penalties supersede local ordinances enacted under the older law.

In finding the 1959 law valid the Court turned down arguments that it represented an unlawful delegation of legislative power, that the classification of merchandise prohibited from sale was arbitrary and capricious, and that the referendum provision was arbitrary and discriminatory.

(Two Guys from Harrison, Inc. v. *Furman*, Superior Court of New Jersey, Law Division, November 27, 1959, Scherer, J., 156 A. 2d 57.)

Federal Estate Tax . . . *deductible bequest*

A New Mexico woman's testamentary bequest to the League of Women Voters does not qualify as a deduction from the gross estate for estate tax purposes, according to a decision of the United States Court of Claims. The Court, with two judges dissenting, said the ladies were too active influencing votes to come under the language of the tax-exemption statute.

The precise question raised was whether the League is a "corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes . . . no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation", within the meaning of §812(d) of the Internal Revenue Code of 1939. The decedent died in 1949 and the activities of the League for the years from 1948 to 1950 were studied to determine the status of the League.

These figures showed that of the total of 141,843 hours devoted to the League by its members, no more than two per cent was classified as devoted to influencing legislation. The Court conceded that the League is operated for educational purposes, within the meaning of the statute, but it held that, despite the time percentage, the substantial part of the League's activity was carrying on propaganda and attempting to influence legislation. It pointed to the goals of the League's program for the years in question and emphasized the procedure by which local units of the League are advised of positions taken and are sometimes urged to take action regarding pending bills in Congress.

From this the Court declared: "It seems to us that the hours spent by some 128,000 women in more than 700 local leagues deliberating and discussing what position, if any, should be taken on questions of public inter-

est, are spent in preparation for the influencing of legislation . . . When agreement has been reached on a national scale and the League's convention has stated the League's program, it seems to us that all action of all the women of the League from that time forward is taken for the purpose of influencing legislation . . . [T]he influencing of legislation is the League's main purpose and reason for being."

The two dissenters said the majority failed "to recognize the vast difference between attempting to promote general policies and principles of government . . . and drive or lobbying for legislation that has for its purpose the serving of the interests of a limited or selfish group", and declared that Congress meant only to ban the latter type. The League, they concluded, "is clearly not the type of organization which the Congress meant to exclude from the benefits of the tax-exemption section".

Deciding a similar question recently, the Court of Appeals for the Second Circuit held that the New York State Bar Association, The Association of the Bar of the City of New York and the New York County Lawyers Association qualified to receive deductible gifts. It ruled the associations' legislative activities were attempts to improve the administration of justice or to clarify technical matters of substantive law, rather than selfish attempts at "economic aggrandizement", the thing at which it regarded the statute as aimed.

(League of Women Voters v. *U.S.*, United States Court of Claims, January 20, 1960, Madden, J.)

Labor Law . . .
recognitional picketing

The Court of Appeals for the Second Circuit has joined the District of Columbia Circuit in holding that peaceful picketing of an employer's premises for recognitional purposes is not proscribed by the Labor-Management Relations Act as it stood prior to its amendment in 1959. The Fourth Circuit recently ruled the other way in *N.L.R.B.* v. *United Rubber, etc. Workers Local No. 511*, 269 F. 2d 694 (45 A.B.A.J. 1077; October, 1959).

The question is academic since the 1959 legislation, which makes it an unfair labor practice "to picket . . . any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees . . ." if the labor organization is not the certified representative and there has been an election within the preceding twelve months. The 1959 law, however, does not apply to conduct occurring before its effective date.

In the instant case the National Labor Relations Board had found the employer picketing to be restraint and coercion of employees, within the meaning of §8(b)(1)(A), in the exercise of one of their rights under §7, the right not to organize. The Court disagreed with this. It pointed to the long administrative interpretation otherwise by the Board and concluded that Congress would not have enacted the 1959 legislation had such picketing already been proscribed. "We should proceed cautiously when urged to outrun the legislative mandate", the Court declared.

On another aspect of the case—picketing at customers' premises—the Court agreed with the Board that the union's conduct was an unfair labor practice under §§8(b) (4) (A) and (B).

(National Labor Relations Board v. *International Brotherhood of Teamsters Local No. 182*, United States Court of Appeals, Second Circuit, November 27, 1959, Smith, J., 272 F. 2d 85.)

Patents . . .
prior art and ACTH

Armour and Company has lost a patent infringement suit against Wilson & Company, Inc., based on Armour's patent of gelatin-ACTH. The Court of Appeals for the Seventh Circuit held that use of gelatin as a delaying agent was well-known by those who had worked in the field and that therefore the patent as to its use with ACTH was invalid.

ACTH, whose full name is adrenocorticotrophic, is obtained from the pituitary glands of animals and is used by human beings to relieve such conditions as rheumatoid arthritis and allergies. The patent in question covered the invention of the pharmaceutical combination of gelatin and ACTH, the former acting as a sort of slowing agent or absorption control for the latter when it is injected in the human body.

The Court agreed with the trial judge's ruling that there was no novelty or invention and that the prior art of the use of gelatin as a long-acting agent was widely known. The patent, the Court said, involved only a new and analogous use of gelatin. "Nor can it be soundly argued", the Court remarked, "that the frontiers of science have, in any way, been rolled back by the suggestion to use gelatin with ACTH."

In a separate memorandum Chief Judge Hastings explained that the Seventh Circuit determined to hear this case *en banc* to resolve "the standards to be applied in determining the validity of a patent within the scope of our appellate review". Noting this question is sometimes couched as whether the validity of a patent is a question of fact or law, the Court concluded that in patent cases it should look at findings of fact as to invention in the way that factual determinations are reviewed generally, but that it should examine "the standards of invention applied to these facts as a question of law . . ."

(Armour and Company v. *Wilson & Company, Inc.*, United States Court of Appeals, Seventh Circuit, January 14, 1960, Duffy, J.)

Torts . . .
shells in food

No cause of action, the Supreme Court of Ohio has told a restaurant patron who claimed $51,542 damages from ingesting a piece of oyster shell that was contained in a fried oyster. In so ruling the Court adopted the reasonable-expectancy rule, holding that since a shell is natural to oysters the diner should have been on the lookout and thus avoided eating the shell. Three judges dissented.

The complaint, which was dismissed

by the trial court, contained breach-of-implied-warranty and negligence counts. The Supreme Court pointed out that whether the complaint was good would be a matter entirely controlled by Ohio statutes, since that state's sales act has been interpreted to include sales of meals by restaurants and the state has an adulterated food statute, violation of which has been held to be negligence *per se*. The Court concluded, therefore, that the question was whether the fried oyster was "adulterated" within the meaning of the one statute, or not "reasonably fit for eating" within the meaning of the implied-warranty provisions of the sales act.

Reviewing the cases from other jurisdictions and noting the size of the oyster shell, the Court declared: "[T]he possible presence of a piece of oyster shell in or attached to an oyster is so well known to anyone who eats oysters that we can say as a matter of law that one who eats oysters can reasonably anticipate and guard against eating such a piece of shell, especially where it is as big a piece as the one described in plaintiff's petition. It is our opinion that the presence in one of a serving of six fried oysters of a piece of oyster shell 'approximately 3 x 2 centimeters [about 1-1/5 x 4/5 inches] in diameter' will not justify a legal conclusion" that the oysters were "adulterated" or not reasonably fit for eating.

The dissenting judges thought both counts stated causes of action by which the plaintiff was entitled to go to the jury, assuming proof supported the allegations. They emphasized the size of the shell fragment and declared a jury could reach the conclusion that the food was not fit for human consumption or was adulterated because the size was extraordinary and unanticipated.

(*Allen* v. *Grafton*, Supreme Court of Ohio, January 20, 1960, Taft, J., 170 Ohio St. 249.)

What's Happened Since . . .

■ On January 18, 1960, the Supreme Court of the United States by a series of decisions held that neither civilians employed by nor dependents accompanying the Armed Forces overseas may be tried constitutionally by courts martial for criminal offenses, capital or non-capital. Three of the cases decided by the Supreme Court had been noted in "What's New in the Law", and they fared as follows:

AFFIRMED the decision of the United States District Court for the Southern District of West Virginia in *Kinsella* v. *U.S.* ex rel. *Singleton*, 164 F. Supp. 707 (44 A.B.A.J. 1203; December, 1958), that the wife of a serviceman cannot be subjected to court-martial trial for a non-capital crime committed while accompanying her husband overseas.

AFFIRMED the decision of the Court of Appeals of the District of Columbia Circuit in *McElroy* v. *U.S.* ex rel. *Guagliardo*, 259 F. 2d 927 (44 A.B.A.J. 1202; December, 1958), that a civilian employee of the Armed Forces cannot be subjected to court-martial trial for a non-capital crime committed while employed overseas. The District Court had denied the petition for a writ of habeas corpus, 158 F. Supp. 171 (44 A.B.A.J. 365; April, 1958).

REVERSED the decision of the Court of Appeals for the Third Circuit in *Grisham* v. *Hagan*, 261 F. 2d 204, and held that an Armed Forces civilian employee overseas cannot be subjected to a court-martial trial for a capital offense. This holding also reversed the United States District Court for the Middle District of Pennsylvania, where the case was heard *sub nom.* *Grisham* v. *Taylor*, 161 F. Supp. 112 (44 A.B.A.J. 684; July, 1958).

■ On January 25, 1960, the Supreme Court of the United States:

DISMISSED APPEAL in *Gair* v. *Peck*, 6 N.Y. 2d 97, 160 N.E. 2d 45 (45 A.B.A.J. 1079; October, 1959), leaving in effect the decision of the New York Court of Appeals that the Appellate Division of the New York Supreme Court, as the court exercising professional discipline jurisdiction in New York, has the power to establish by rule a scale of attorneys' contingent fees in personal-injury and wrongful-death cases and to provide that charges beyond the scale, without approval as provided by the rule, are violations of professional ethics. Two lower New York courts had split in considering the rule. The trial court said the Appellate Division had no authority to adopt the rule, 165 N.Y.S. 2d 247 (43 A.B.A.J. 1125; December, 1957), but the Appellate Division, Third Department, which was not the appellate division that had promulgated the rule, reversed, 171 N.Y.S. 2d 594 (44 A.B.A.J. 575; June, 1958).

■ On December 16, 1959, the Supreme Court of Illinois modified on rehearing its decision in *Molitor* v. *Kaneland Community Unit District No. 302* (45 A.B.A.J. 748; July, 1959), in which it discarded the rule of governmental immunity to tort actions. The case involved a public school bus accident and the Illinois Court reversed the trial court's dismissal of the complaint. In the opinion on rehearing (18 Ill. 2d 11) the Court adhered to its no-immunity doctrine, but made the effect of the decision prospective except as to the "plaintiff" in the case. The use of the singular disturbed the plaintiff's attorney because several other children injured in the same accident were in the suit, but the appeal was taken in the name of only one in order to test the immunity rule. On January 20, however, the Illinois Court dismissed petitions filed by the other children seeking to intervene in the appeal and to have their rights to maintain their suits declared.

■ On December 28, 1959, the Court of Appeals for the Ninth Circuit, on remand of *In re Sawyer*, 260 F. 2d 189 (44 A.B.A.J. 779; August, 1958), after reversal by the United States Supreme Court, 360 U.S. 622, issued its mandate to the Supreme Court of Hawaii to dismiss the disciplinary proceedings against the respondent and "award judgment [to her] for her costs incurred in this Court". Dissenting sharply from the costs provision, one judge said: "Against whom [shall the costs be awarded]? The Supreme Court of Hawaii? The State of Hawaii? The Bar Association of Hawaii? . . . Before it entertains a complaint against one of its members, must the Bar Association stop to consider if it can afford it?"

Department of Legislation

Charles B. Nutting, Editor-in-Charge

Professor Dickerson is the author of "Legislative Drafting" and has often contributed to this Department. His discussion of the "and" and "or" problem will be of interest not only to legislative specialists but to other draftsmen as well.

The Difficult Choice Between "And" and "Or"

By Reed Dickerson, Professor of Law, Indiana University

One of the difficult problems in writing, particularly in a field such as legal drafting that calls for high precision, is to know when to use "and" and when to use "or". I know several excellent draftsmen who say that they develop mental blocks whenever they meet a complicated situation involving this decision. The lawyers' recent preoccupation with the mysteries of "and/or" has distracted attention from the broader difficulties here.

Fortunately for the courts and the other readers of definitive legal documents, a correct choice between "and" and "or" does not always control the result. This is because the basic principle that language is to be read in its broadest appropriate context has laid bare intended meanings unsupported or denied by a grammatical word-for-word construction of the text. This being so, why discuss so pedestrian, grammatically technical, and almost minuscule a subject as choosing between "and" and "or"?

The answer is partly that context, however valuable, does not resolve all doubts and correct all imprecisions. Also, because a system of communication should be internally consistent, grammar should support, rather than subvert, intended meanings otherwise revealed. That the choice between "and" and "or" is of minor importance in the broad range of drafting problems is not significant because general clarity is usually the cumulative result of attending to many individually insignificant matters. But enough of apologies.

The reader will wonder why the following analysis ignores the many court decisions construing specific uses of "and" and "or". The answer is that such decisions (being concerned for the most part with misused language[1]) are largely irrelevant to this discussion. Even where they are not irrelevant they carry no official weight. Although the courts are the final arbiters of the meaning of particular litigated documents, their pronouncements are directed in such cases toward extracting the meaning of the whole document when viewed in its proper setting, which means overriding any specific inconsistent wording. This is different from saying that courts speak authoritatively on the normal factual meanings of words and phrases when read out of their contexts. In determining current general usage, the courts have no official function or special competence beyond the fact that their duties offer a broad opportunity for acquiring sophistication in this field. There is, therefore, a vast difference between a court's saying, "This is what the word 'vehicle' officially means in this particular litigated document" and its saying, "This is the normal and usual meaning of the word 'vehicle'."

The difference between "and" and "or" is usually explained by saying that "and" stands for the conjunctive, connective, or additive and "or" for the disjunctive or alternative. The former connotes "togetherness" and the latter tells you to "take your pick". So much is clear. Beyond this point, difficulties arise.

One difficulty is that each of these two words is on some occasions ambiguous. Thus, it is not always clear whether the writer intends the *inclusive* "or" (A or B, or both) or the *exclusive* "or" (A or B, but not both). This long recognized uncertainty has given rise to the abortive attempt to develop "and/or" as an acceptable English equivalent to the Latin "vel" (the inclusive "or").[2]

What has not been so well recognized is that there is a corresponding, though less frequent, uncertainty in the use of "and". Thus, it is not always clear whether the writer intends the *several* "and" (A and B, jointly or severally) or the *joint* "and" (A and B, jointly but not severally). This uncertainty will surprise some, because "and" is normally used in the former sense. Even so, the authors of documents sometimes intend things to be done jointly or not at all. This idea inheres in the purchase of a pair of shoes (try to buy one shoe separately!) without, however, posing any grammatical problem. On the other hand, a reference to "husbands and wives" may create a grammatical uncertainty as to whether the right, privilege, or duty extends to husbands without wives, and vice versa, or whether it may be enjoyed or discharged only jointly.[3] Where such a doubt exists, it is desirable to recognize and deal with it.

1. *E.g.*, *De Sylva* v. *Ballentine*, *Guardian*, 351 U. S. 570, 573 (1956) reh. den. 352 U. S. 859.

2. Dickerson, LEGISLATIVE DRAFTING 85, note 4 (1954). And see works on logic cited in note 4 below. Some logicians would add a third meaning of "or", that of *equivalence*. Thus, the sentence, "The canine, or dog, is a useful animal", can be viewed as asserting the equivalence of the things respectively designated by the words "dog" and "canine". From this it might seem that in such a context "or" means "which is equivalent to". On the other hand, it seems unnecessary to postulate a third meaning here, because the use of "or" in the quoted statement can be justified without it. Thus, the statement can be viewed grammatically, not as an assertion of the equivalence of the things to which the words "dog" and "canine" refer, but as an assertion that the identical thing may be referred to by either of two alternative names. The former is a statement about things; the latter, a statement about words. It is questionable, therefore, whether such a use of the disjunctive "or" in the metalanguage involves any more than a shift in context. Fortunately, the principle that synonymous expressions are taboo in legal drafting makes the question for present purposes moot.

3. Driedger, THE COMPOSITION OF LEGISLATION 9 (1957). Some logicians have expressly recognized variations in the use of the word "and". For example, Frye and Levi, RATIONAL BELIEF 180-181 (1941) contrasts the *enumerative* "and" (mere conjunction) with the *wholistic* "and" (conjunction involving logical relation). The same distinction seems to underlie the differentiation of *conjunctive compounds* and *implicative compounds* in Veatch, INTENTIONAL LOGIC 336-339 (1952). See also note 5 below. This distinction is not necessarily the same as that drawn in the text because, for one thing, the

Observation of legal usage suggests that in most cases "or" is used in the inclusive rather than the exclusive sense,[4] while "and" is used in the several rather than the joint sense. If true, this is significant for legal draftsmen and other writers, because it means that in the absence of special circumstances they can rely on simple "or's" and "and's" to carry these respective meanings. This, incidentally, greatly reduces the number of occasions for using the undesirable expression "and/or" or one of its more respectable equivalents, such as "A or B, or both", or "either or both of the following".

Special circumstances in which it is unsafe to rely on general usage exist, on the other hand, wherever the courts have shown an unfriendly or biased attitude in "interpreting" language. Thus, in drafting a criminal statute, with respect to which the courts are inclined to legislate restrictively under the euphemism of "strict construction", it is safer not to rely on the chance that "or" will be given its normal inclusive reading but to say expressly "shall be fined not more than $5,000 or imprisoned not more than three years, *or both*".

Another and more perplexing difficulty in the use of "and" and "or" is that it is often uncertain, because of a possible conflict between grammar and immediate context, whether the draftsman has attempted an enumeration of people or institutions, on the one hand, or of their characteristics or traits, on the other. Take the phrase "every husband and father". If this is intended as an enumeration of two classes of persons, that fact can be less equivocally expressed by saying "every husband and every father" or, taking another approach, by saying "every person who is either a husband or a father". If, on the other hand, it is intended as an enumeration of characteristics or traits necessary to identify each member to be covered, that alternative can be less equivocally expressed by saying "every person who is both a husband and a father".[5]

As the foregoing examples show, the former alternative meaning can be expressed, without changing substance, either by an enumeration of persons, using "and", or by an enumeration of their identifying characteristics or traits, using "or". This does not say that "and" means "or". It says that whether you use "and" or "or" in such a case depends upon whether you identify the affected persons by enumerating the several classes into which they may fall or by defining them as a single class by enumerating their qualifying characteristics. A corollary of this is that shifting from "and" to "or" without shifting from a "persons" approach to a "characteristics" or "traits" approach changes the grammatical meaning.

Because of the subtlety of the point, it may be desirable to clarify it with an example and explanation that I have used elsewhere:[6]

> . . . Compare, for instance, these two provisions:
>
> *Provision A:*
> The security roll shall include—
> (1) each person who is 70 years of age or older;
> (2) each person who is permanently, physically disabled; *and*
> (3) each person who has been declared mentally incompetent.
>
> *Provision B:*
> The security roll shall include each person who—
> (1) is 70 years of age or older;
> (2) is permanently, physically disabled; *or*
> (3) has been declared mentally incompetent.
>
> Although both provisions say exactly the same thing, "and" is necessary to provision A because it enumerates three separate classes of persons each of which must be included, whereas "or" is necessary to provision B because it names a single class of persons by enumerating its three alternative qualifications for membership.

To illustrate some typical problems involving "and" or "or", I will now discuss four basic variations of phrase that are commonly used. The discussion of these variations is not intended to imply that either "and" or "or", or the phrases in which they are used, can be interpreted in specific utterances apart from the contexts in which they respectively appear. Clearly, they cannot. Even so, we are not foreclosed from making appropriate generalizations about the usual meanings of these phrases. Instead of disembodying them, such generalizations imply useful generalizations about the kinds of contexts in which these phrases tend in legal experience to appear and, in part, recognize that even when read out of specific context particular words and phrases retain much of the flavor of their usual associations.

One of the normal functions of context is to provide the basis for imply-

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simple package deal is not the only kind of logical relation that can exist between conjoined entities. Moreover, it seems questionable that the draftsman of a legal document would have legitimate occasion to use mere conjunction, that is, to use "and" to connect wholly unrelated statements. If this is true, the distinction drawn in the text is for the most part between two kinds of implicative compounds, to use Veatch's terminology, and does not ordinarily involve conjunctive compounds at all. For legal instruments, therefore, the distinction drawn in the text would appear to be more significant than that drawn, for quite different purposes, by Frye and Levi or Veatch.

4. Webster's NEW INTERNATIONAL DICTIONARY (2d ed. 1958) at page 1712 defines "or" only in its exclusive sense. To the same effect is Bosanquet, LOGIC, book I, chapter VIII, section 1 (1888). The following agree that usage supports the exclusive "or": Bradley, PRINCIPLES OF LOGIC, chapter IV (2d ed. 1922), and Ushenko, THE THEORY OF LOGIC 45 (1936). In Joseph, AN INTRODUCTION TO LOGIC 187 (2d ed. 1916), this is considered the "safer" interpretation. On the other hand, Stebbing, A MODERN INTRODUCTION TO LOGIC 70-71 (6th ed. 1948) says: "It is not usual to interpret the 'or' in an alternative proposition as expressing the *exclusion of one alternative*. That is, 'or' is consistent with 'perhaps both'... the *onus probandi* lies on those who assert that the *logical* interpretation of 'or' should be exclusive. It cannot be maintained that the common use is exclusive... It is not to be denied that it is sometimes clear that two alternatives exclude each other. But the exclusion is due to the nature of the alternatives, not to the form of the proposition." To the same effect is Keynes, FORMAL LOGIC 278 note (4th ed. 1906). The following agree that usage supports the inclusive "or": Burtt, RIGHT THINKING 134 note (3 ed. 1946); Coffey, THE SCIENCE OF LOGIC 285 (2d ed. 1918); Frye and Levi, RATIONAL BELIEF 178 (1941); Gibson, THE PROBLEM OF LOGIC 135 (1908); Mace, PRINCIPLES OF LOGIC 61 (1933); and Quine, METHODS OF LOGIC 4 (1950). Whatever general over-all usage may be, it is believed that general legal usage conforms to Stebbing's statement. In Tarski, INTRODUCTION TO LOGIC 21-23 (2d ed. 1946), it is suggested that "or" be used to denote the inclusive "or" and "either . . . or" to denote the exclusive "or".

5. See Driedger, note 3 above, at 8-9. This uncertainty must be distinguished from that involved in choosing between the joint "and" and the several "and". The ambiguity in the phrase "every husband and father", unlike that in the phrase "husbands and wives", lies not so much in the meaning of "and" as in the immediate context in which it appears. Thus, the central question is not, "What does 'and' mean?" but, "What is 'and' being used to enumerate?" This becomes clear when the phrase is used in a mandatory sentence, *e.g.*, "Every husband and father shall report annually". In such a case, "and" is necessarily joint whichever kind of enumeration is involved. It is easy to confuse the two issues because in some permissive sentences "and" would be several if the enumeration were of people, but joint if it were of characteristics.

Keynes, FORMAL LOGIC 469 (4th ed. 1906) says that "*and* and *or* occurring in a predicate are understood as expressing a conjunctive or an alternative *term*; but occurring in a subject they are understood as expressing a conjunctive or an alternative *proposition*." The latter is true of the sentence, "John and George are boys", *i.e.*, "John is a boy and George is a boy". It is not true of the sentence, "John and George are friends". McCall, BASIC LOGIC 70-71 (1948). Nor does it appear to be true of enumerations of adjectives and other modifiers. Thus, the normal interpretation of the sentence, "Red and white banners are beautiful", is not "Red banners are beautiful and white banners are beautiful", but "Banners that are both red and white are beautiful". And see Coffey, THE SCIENCE OF LOGIC 197-198 (2d ed. 1918).

6. See Dickerson, note 2 above, at 85.

ing limitations on otherwise overly broad general terms. There is, for instance, no risk in referring to "the Administrator" in a paragraph or section in which the official is otherwise identified. Context limits also in other ways. Thus, the following discussion recognizes that the grammatical alternatives are conditioned by whether the enumeration is assumed to appear in a mandatory or permissive sentence. It further recognizes that these alternatives are also conditioned by whether the connective in question links characteristics that are potentially cumulative or mutually exclusive.

More specifically, the examples dealing with the modifiers "charitable" and "educational" must be appraised in the light of the fact that these terms are potentially cumulative in that the same institution can be both charitable and educational. On the other hand, those dealing with the modifiers "hospital" and "burial" must be appraised in the light of the fact that these terms are not potentially cumulative, but mutually exclusive. An expense can be a hospital expense or a burial expense, but the same expense cannot be both.

Phrase (1): "*Charitable and educational institutions*"

Does this mean:

(a) "institutions that are both charitable and educational"; or

(b) "charitable institutions and educational institutions"?

If you tabulate phrase (1), remembering the fact that strings of adjectives are normally used cumulatively, rather than distributively,[7] you get this:

"Institutions that are:
"(1) charitable; and
"(2) educational."

Although sense (b) is sometimes intended by this phrase, it is believed that sense (a), as expressed in the tabulation, is the normal grammatical reading, that is, the way it is usually read in practice. This is true whether the sentence is mandatory or permissive.

Phrase (1) is therefore a proper way of expressing the idea of "institutions that are both charitable and educational". If sense (b) is intended, it is better to express it as sense (b) is expressed above (see also phrase (3), below), or in some other way different from phrase (1).

Compare the phrase "hospital and burial expenses", in which the modifiers are mutually exclusive. Because the same expense cannot be both "hospital" and "burial", only sense (b) is possible, and the phrase can mean only "hospital expenses and burial expenses". Although the phrase "hospital and burial expenses" is shorter and has the sanction of usage, it would seem grammatically preferable to say "hospital expenses and burial expenses", reserving the shorter form for use with potentially cumulative modifiers where sense (a) is both possible and intended.

Phrase (2): "*Charitable or educational institutions*"

Does this mean:

(a) "institutions that are either charitable or educational, but not both";

(b) "institutions that are either charitable or educational, or both";

(c) "charitable institutions or educational institutions, but not both"; or

(d) "charitable institutions or educational institutions, or both"?

If you tabulate phrase (2) similarly to phrase (1) and infer the normal inclusive "or", you get this:

"Institutions that are:
"(1) charitable;
"(2) educational; or
"(3) both."

It is believed that sense (b) as so expressed is the normal grammatical reading. This is true whether the sentence is mandatory or permissive. Phrase (2) is therefore a proper way of expressing the idea of "institutions that are either charitable or educational, or both". If sense (a), (c), or (d) is intended, it is better to express it differently from phrase (2).

On examination, it appears that sense (d), which is apparently different, is in most cases substantively the same as sense (b), because it is normally inferred that, if you may or must have institutions that are either charitable or educational or both, you may also have both charitable institutions and educational institutions. Conversely, it is normally inferred that, if you may or must have both charitable institutions and educational institutions, you may also have institutions that are both charitable and educational.

Compare the phrase "hospital or burial expenses", in which the modifiers are mutually exclusive. Here, sense (b) is impossible. Sense (c) is also eliminated if you infer the normal inclusive "or". Instead, it is believed that sense (a) is the normal grammatical reading. Examination similarly shows that sense (d) is substantively the same as sense (a) in most cases, because, if you may or must pay expenses that are either hospital or burial, it is normally inferred that you may pay both kinds.

Phrase (3): "*Charitable institutions and educational institutions*"

Does this mean:

(a) "both charitable institutions and educational institutions", which may include institutions that are both charitable and educational; or

(b) "charitable institutions or educational institutions, or both", which may include institutions that are both charitable and educational?

If the sentence is mandatory, you must have both kinds of institutions (*i.e.*, a "package deal" is intended). Here, "and" is joint rather than several, and sense (a) is the normal grammatical reading.

If the sentence is permissive, it is normally inferred that you may have one kind without the other (*i.e.*, no "package deal" is intended). Here, "and" is several rather than joint, and sense (b) is the normal grammatical reading.

Compare the phrase "hospital expenses and burial expenses", in which the modifiers are mutually exclusive. Here the answers are the same, except that the possibility of including an expense that is both "hospital" and "burial" is excluded from both sense (a) and sense (b).

Phrase (4): "*Charitable institutions or educational institutions*"

Does this mean:

(a) "charitable institutions or educational institutions, but not both", which may not include institutions that are both charitable and educational; or

(b) "charitable institutions or edu-

7. See second paragraph of note 5 above.

cational institutions, or both", which may include institutions that are both charitable and educational?

If you infer the normal inclusive "or", sense (b) is the normal grammatical reading. This is true whether the sentence is mandatory or permissive.

Compare the phrase, "hospital expenses or burial expenses", in which the modifiers are mutually exclusive. Here the answer is the same, except that the possibility of including an expense that is both "hospital" and "burial" is excluded from sense (b).

It is interesting to note that for the cumulative modifiers "charitable" and "educational" senses (b) and (d) of phrase (2), sense (b) of phrase (3), and sense (b) of phrase (4), the normal grammatical ways of reading these respective phrases, are substantively the same in any case in which the sentence is permissive. Thus, if you intend that the person covered by the statute is to be free to have either, neither, or both, you may use any of these three sentences to express the idea:

(A) "He may contribute to charitable or educational institutions."

(B) "He may contribute to charitable institutions and educational institutions." Here, "and" is several, not joint.

(C) "He may contribute to charitable institutions or educational institutions." Here, "or" is inclusive, not exclusive.

Sentences (B) and (C) differ only in that the former uses "and", whereas the latter uses "or". Because both sentences mean the same thing, it follows that "and" and "or" produce the same result in such a context. Stating the matter broadly, we can say that in a permissive sentence the inclusive "or" is interchangeable with the several "and". (Again, this does not say that "and" means "or". It says that in such a context the two words are reciprocally related in that the implied meaning of one is the same as the expressed meaning of the other.)

Of the three ways of extending permission, sentence (B) is to be preferred. Sentence (A) is open to the objection that its applicability to both charitable institutions and educational institutions is based on inference (a strong one, however). Sentence (C) is open to the objection that in the wider context of the statute as a whole it is more likely that "or" will be read as exclusive than that "and" will be read as joint.

With respect to the alternative modifiers "hospital" and "burial", the same analysis applies, except that, because they cannot be cumulative, there is the fourth alternative of using phrase (1):

(D) "He may pay the hospital and burial expenses".

As pointed out in connection with phrase (1), sentence (D) is not as desirable grammatically as sentence (B).

The reader is warned that many of the foregoing generalizations are based only on personal observation. So far as they have not (to my knowledge) been confirmed by exhaustive scientific investigation they remain subject to honest skepticism. Even so, they may retain some value as potential conventions that, if adopted, would ultimately crystallize the very usages that I believe them now to reflect. While I do not rest my analysis on this kind of bootstrap pulling, it is comforting to recognize its supporting effect.

The reader is also warned that, even if sound, the foregoing generalities on usage are valid only as observed tendencies. The value of relying on such generalities is not that they foreclose all possibility of ambiguity or other uncertainty (they are incapable of discharging this responsibility). Rather, it is that they establish probable meanings that, fortified in particular cases by general and specific context, are strong enough so that the incidence of uncertainty remaining after a careful reading of the whole statement in its proper setting is reduced to the point where an attempt to eliminate it altogether would cost more in prolixity and unreadability than would be gained by attaining the unattainable ideal of absolute certainty.

While the foregoing analysis is hardly reducible to several handy rules of thumb, perhaps it will be helpful in some instances in lessening the confusion that now exists in this area.

Make Your Hotel Reservations Now!

The Eighty-Third Annual Meeting of the American Bar Association will be held in Washington, D. C., August 29-September 2, 1960.

The January, 1960, issue of the JOURNAL carries a complete announcement with respect to hotels, registration, etc., and in requesting accommodations please use the hotel reservation application therein provided.

Attention is called to the fact that many interesting and worthwhile events of the meeting will take place on Sunday, August 28, preceding the opening sessions of the Assembly and the House of Delegates on Monday, August 29.

Requests for hotel reservations should be addressed to the Registration Department, American Bar Association, 1155 East 60th Street, Chicago 37, Illinois, and must be accompanied by payment of the $35.00 registration fee for each member for whom reservation is requested. This fee is NOT a deposit on hotel accommodations but is used to help defray expenses for services rendered in connection with the meeting.

Be sure to indicate three choices of hotels, type of accommodations desired and by whom you will be accompanied. We must also have definite dates of arrival and departure.

Tax Notes

Prepared by Committee on Bulletin and Tax Notes, Section of Taxation, Kenneth H. Liles, Chairman; John M. Skilling, Jr., Vice Chairman.

Special Retirement Income Exclusion for Employees of Charitable Organizations.

By Stephen M. Piga, New York, New York

Most lawyers are familiar with the tax deferral benefits of a pension, profit-sharing or stock bonus plan which is "qualified" under Section 401 (a) of the 1954 Internal Revenue Code. Most lawyers are also familiar with the attempts made in Congress to extend similar tax benefits to the self-employed. These fields of retirement income taxation have received wide publicity and lengthy analysis.

However, how many lawyers realize that the Internal Revenue Code now permits teachers, clergymen and employees of a limited group of tax-exempt charitable, educational, religious, literary, scientific and public safety organizations to defer tax until retirement on varying percentages of their current incomes ranging from a minimum of 16⅔ per cent to a maximum of 70 per cent or 80 per cent, depending in part on length of service, without the utilization of any "qualified" retirement plan? This tax deferral can be initiated on an individual basis and has been made possible by Section 23 of the Technical Amendments Act of 1958.

I. Legislative Background

Prior to the enactment of the Technical Amendments Act of 1958, Section 403(a) of the Internal Revenue Code of 1954 provided an unlimited income tax deferral for annuity payments made by tax-exempt educational, charitable, and religious organizations[1] on behalf of their employees whether or not the payments were made under a "qualified" non-discriminatory plan.

This special deferral provision led to a situation where some tax-exempt organizations began to trade on the tax-deferment privilege of their employees. Certain of these organizations began to pay selected employees all, or almost all, of their compensation in annuities. These selected employees were usually individuals who worked part-time for the tax-exempt organizations, who derived their principal income from other sources and who had no immediate need for the income from their part-time employment. By reason of Section 403(a) of the 1954 Code, these individuals were permitted to defer all income tax on this extra compensation by receiving payment in the form of annuities.

The Treasury attempted to counteract this utilization of Section 403(a) of the 1954 Code by the promulgation of Regulations Section 1.403(a)-1(a)(3). This regulation limited the tax deferral privilege attending annuities purchased by tax-exempt organizations to annuities which were "merely a supplement to past or current compensation" of the employees. In determining whether an annuity payment was "merely a supplement to past or current compensation", the ratio of the payment to past or current compensation was considered, with a 10 per cent ratio being satisfactory under the example given in the regulation. Further, the regulation stated that annuities purchased as a result of an agreement for a reduction in salary or in lieu of a salary increase to which the employee might otherwise be entitled would not qualify for the tax-deferral privilege.

Although the regulation probably eliminated part of the trading on the tax-deferral privilege by tax-exempt organizations, the tests of the regulation had no firm statutory basis. In addition, it unfairly put new employees of tax-exempt organizations in a better position than older employees because older employees could not change their terms of employment without confronting the disqualification tests of the Treasury. With this situation in mind, Congress approved Section 23 of the Technical Amendments Act of 1958.

II. Section 403(b) of the 1954 Internal Revenue Code

Section 23 of the Technical Amendments Act of 1958 amended Sections 101(b), 403, 2039(c) and 2517 of the 1954 Internal Revenue Code. The most important of these amendments were those deleting reference to tax-exempt organizations in Section 403(a) and adding a new Section 403(b) to fill the gap, both of which became effective with respect to taxable years beginning after December 31, 1957.

Section 403(b) of the 1954 Code, as amended, provides a limited exclusion from the gross income of employees of certain tax-exempt organizations for amounts contributed by their employers for the purchase of employee annuity contracts. The included tax-exempt organizations are those described in Section 501(c)(3) of the Code, *i.e.*, "corporations and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or for the prevention of cruelty to children or animals".

Section 403(b) becomes operative only if the employee annuity is not provided under a "qualified" retirement plan and only if the annuity contract provides nonforfeitable benefits to the covered employee. If these two conditions are met, and if the employer is a tax-exempt organization described in Section 501(c)(3), the employee may exclude from gross income his employer's payments for the purchase of annuities on his behalf. However,

1. Organizations described in Section 501(c)(3) of the 1954 Code which were exempt from tax under Section 501(a).

the maximum amount of the exclusion is limited to the individual employee's "exclusive allowance".

The amount of each employee's "exclusion allowance" is calculated under a statutory formula set forth in Section 403(b)(2) of the Code. An employee's "exclusion allowance" for any taxable year is determined by multiplying 20 per cent of his "includible compensation" (defined in Section 403(b)(3)) by the number of his "years of service" (defined in Section 403(b)(4)) with the employer, and by subtracting therefrom any amounts which were contributed by the employer to purchase an annuity for him and which were excludible from his gross income for any prior taxable year. Essentially an employee's "exclusion allowance" is 20 per cent of his salary for the taxable year (excluding annuity contributions for such year) times years of service, less tax-free annuity contributions made by the employer for prior years.

For example, assume that a professor with twenty years of service in the employment of X College receives "includible compensation" in the amount of $8,000 during 1960. In addition, X College contributes $2,000 for the purchase of annuities on his behalf during the same year. This is X College's initial annuity payment for the professor. His "exclusion allowance" for 1960 would be $32,000 (20 per cent of $8,000 times 20 years of service). The entire amount of the 1960 annuity contribution would be excludible from his gross income.

If the professor wishes, he could defer tax on a greater amount of his compensation by requesting X College to purchase additional nonforfeitable retirement annuities on his behalf. Contrary to the rule set forth in the Treasury Regulations prior to the enactment of the Technical Amendments Act of 1958, the professor could take a reduction in current salary and have the amount of the reduction applied to the purchase of annuities on his behalf without being taxed currently on any amount so applied which does not exceed his "exclusion allowance" for the taxable year.

The Senate Finance Committee Report[2] on the Technical Amendments Act of 1958 states on page 36 that the objective 20 per cent rule set forth in Section 403(b) is intended as a complete substitute for the tests of the Treasury Regulations existing under Section 403(a) prior to amendment. Thus, it is clear that the professor on an individual basis may negotiate a reduction in salary for tax deferral purposes or may elect annuity contributions in lieu of a salary increase to which he would otherwise be entitled. In either case, the benefits of Section 403(b) would be available so long as the amounts paid for annuities did not exceed his "exclusion allowance" for the taxable year. The Internal Revenue Service has accepted this view in at least one private ruling.

It should be noted, however, that if the professor receives more than $2,000 during 1960 in the form of annuities, it becomes necessary to recalculate his 1960 "exclusion allowance". The term "includible compensation", upon which the 20 per cent test is based, does not include any amount contributed by the employer for an annuity to which Section 403(b) applies. Thus, if the professor receives $4,000 in the form of annuities and $6,000 as "includible compensation", his "exclusion allowance" for 1960 would be $24,000 (20 per cent of $6,000 times twenty years of service). If the professor wishes to defer tax in 1960 on the maximum amount permissible under Section 403(b), he could take $8,000 in the form of annuities, leaving $2,000 as "includible compensation". In this case his "exclusion allowance" for 1960 would be $8,000 (20 per cent of $2,000 times twenty years of service).[3]

It should also be noted that the maximum amount excludible by the professor in 1961 would be less than the 1960 maximum of $8,000 assuming that the $8,000 maximum annuity payments were made on his behalf in 1960 and that his 1961 total compensation is still $10,000. This is so because the professor's 1961 "exclusion allowance" must be reduced by the aggregate of annuity payments excludible during prior years. Under these circumstances the maximum amount that he could exclude in 1961 would be $6,538.46 (20 per cent of $3,461.54 times twenty-one years of service minus $8,000). Similarly, the maximum excludible amount would be reduced to $5,455.84 in 1962 and $4,643.87 in 1963, also assuming the same $10,000 annual compensation and the maximum utilization of the exclusion in each year.[4] Thus, the average of his exclusions for the first four years could amount to approximately five-eights of his total compensation for the period, or an aggregate of $24,638.17, a very substantial amount.

III. Pitfall of Constructive Receipt or Availability

Notwithstanding the clear statutory tests set forth in Section 403(b) of the 1954 Code, if the employee requests his employer to purchase annuities out of salary already earned but not yet received, it is clear that the tax deferral provisions of Section 403(b) would not apply. In this case, the salary would have been constructively received or made available to him prior to the purchase of the annuity contracts,[5]

The same result would probably occur if the employee elects in advance to have a certain percentage of salary used to purchase annuities, but reserves the right to change his mind at any time prior to the actual purchase of the annuities by the employer. Again, the employee would probably be immediately taxable on the annuity contributions because of constructive receipt or availability.

In order to avoid immediate taxation under the constructive receipt or availability doctrines, the amount or percentage of the annuity contributions should be written into the individual's employment contract prior to the earn-

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2. 85th Congress, 2d Session, Report No. 1938 of the Committee on Finance of the United States Senate to Accompany H.R. 8381.

3. The maximum "exclusion allowance" for the initial year of annuity contributions is arrived at in the following manner:
X = maximum excludible amount
X = 20% of (total compensation minus X) times years of service
X = .20(10,000 − X) times 20
X = $8,000

4. The formula for arriving at the maximum exclusion for 1961 and subsequent years is as follows:
X = maximum excludible amount
X = 20% of (total compensation minus X) times years of service minus prior annuity contributions
X(1961) = .20(10,000 − X) times 21 minus $8,000.00 = $6,538.46
X(1962) = .20(10,000 − X) times 22 minus $14,538.46 = $5,455.84
X(1963) = .20(10,000 − X) times 23 minus $19,994.30 = $4,643.87

5. See Senate Finance Committee Report No. 1938, *supra*, page 36. See also Rev. Rul. 54-265, C.B. 1954-2, 239.

ing of his salary. In the absence of an employment contract, the employee should make a binding and irrevocable election to have a designated portion or percentage of his future salary for a given period of time set aside by his employer for annuity purchases.

There is considerable danger that such an election made every month or week covering the salary to be earned during the succeeding month or week would not be given effect by the Internal Revenue Service. The safer method would be to have the employee make his irrevocable election in the taxable year preceding the year during which the salary is to be earned and covering the entire subsequent year. In this event there would be little or no basis for a claim that the annuity payments were constructively received or made available in the taxable year following the year in which a binding and irrevocable election was made.[6]

IV. Advantages

Section 403(b) permits the postponement of taxation on income used to purchase annuities until the lower income tax bracket retirement years. It also permits the accumulation of a larger retirement fund from income which has not been immediately taxed.

In addition to these advantages, Section 23 of the Technical Amendments Act of 1958 provides a $5,000 death benefit exclusion (Section 101(b)(2)(B)(iii) of the Code), an estate tax exclusion (Section 2039(c) of the Code) and a gift tax exemption (Section 2517 of the Code), similar to those applicable to "qualified" plans. However, these three additional benefits do not apply to annuities purchased for employees of all Section 501(c)(3) organizations. The benefits are limited to employees and beneficiaries of deceased employees of those tax exempt organizations referred to in Section 503(b)(1), (2) and (3), *i.e.*, religious organizations, schools and organizations supported by governmental units or by the general public.

V. Conclusion

In many respects, Section 23 of the Technical Amendments Act of 1958 is a liberal departure from previously existing policies in the retirement income tax field. Although, primarily, it extends to teachers, clergymen and other individuals devoting their lives to public purposes the income tax benefits adhering to "qualified" pension, profit-sharing or stock bonus plans, it goes beyond the long-standing limitations of "qualified" plans. Section 403(b) permits employees to set aside varying percentages of their current incomes for retirement purposes without the payment of tax and it permits them to negotiate individual retirement plans to suit their own individual immediate and future needs. The flexibility of this new program is readily apparent. The only question would appear to be whether other groups of employees or the self-employed should be permitted the same benefits.

6. See Rev. Rul. 55-423, C.B. 1955-1, 41, which holds that an employee's interest in a profit-sharing plan will not be made available to him where he makes an irrevocable election to defer distributions prior to the time his interest becomes distributable. See also Rev. Rul. 57-260, C.B. 1957-1, 164.

Supreme Court Decisions

(Continued from page 305)

Mr. Justice BLACK, with whom the CHIEF JUSTICE and Mr. Justice BRENNAN agreed, wrote a brief dissent that argued that since the union might still be liable for monetary penalties and the union members might lose their seniority rights, the controversy was not moot. The dissent stated that under *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383, the Missouri judgment should have reversed on the merits.

The case was argued by Mozart G. Ratner for appellants and by Robert R. Wellborn for appellee.

Taxation . . . *ninety-day letter*

United States v. *Price*, 361 U. S. 304, 4 L. ed 2d 334, 80 S. Ct. 326, 28 Law Week 4070. (No. 48, decided January 18, 1960.) *On writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Reversed and remanded.*

This was an action for the collection of a deficiency in taxes allegedly owed for the year 1946 and for the interest thereon. The taxpayer argued that the action could not be maintained because the Commissioner of Internal Revenue had never issued a notice of deficiency, commonly known as a "ninety-day letter". Section 272(a)(1) of the 1939 Internal Revenue Code provides that "If in the case of any taxpayer, the Commissioner determines that there is a deficiency . . . the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. . . No assessment of a deficiency in respect of the tax . . . shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer . . ."

The Government relied upon the fact that respondent had executed a waiver on assessment and collection of the deficiency. The District Court held that the waiver was not effective because the ninety-day letter had not been issued and that Section 272(a)(1) therefore barred the action. The Court of Appeals affirmed.

Speaking for the Supreme Court, Mr. Justice HARLAN refused to accept the taxpayer's "fine-spun refinements" that argued that the deficiency did not come into existence until the mailing of a ninety-day notice. The plain sense of the provision contemplates first a determination and then the sending of a notice, the Court declared, and there is no persuasive reason for "artificially engrafting upon the statutory terms excessively formal conditions". The Court reviewed the legislative history and found support for its reading of the statute there.

Mr. Justice DOUGLAS and Mr. Justice STEWART noted their dissent, based on *Mutual Lumber Co.* v. *Poe*, 66 F. 2d 904.

The case was argued by Howard A. Heffron for petitioner and by W. Lee McLane, Jr., for respondent.

BAR ACTIVITIES

V. P. Crowe

The 55th Annual Meeting of the organized Bar in Oklahoma was held in Oklahoma City on December 2-5.

Elected by the House of Delegates to head the organization during 1960 were V. P. Crowe, of Oklahoma City, President; Douglas McKeever, of Enid, Vice President; Walter Arnote, of McAlester, President-Elect; and Floyd L. Rheam, of Tulsa, House of Delegates representative on the Executive Council.

A legal institute was presented by the Continuing Legal Education Committee and the Economic Status Committee on the general theme of improving the economic status of the lawyer. Out-of-state speakers included Cecil E. Burney, of Corpus Christi, Texas, Chairman of the Bar Activities Section of the American Bar Association; John C. Satterfield, of Yazoo City, Mississippi, Chairman of the American Bar Association's Committee on Economics of Law Practice; and Luther Bang, of Austin, Minnesota, the immediate past president of the Minnesota Bar Association.

A "Lawyer-Laymen Forum", planned by the Judicial Administration of Justice and Reform Committee in cooperation with the Continuing Legal Education Committee, took the form of a panel discussion on the question: "How Should Judges Be Chosen?" Participants on the panel included Clarence D. Northcutt, of Ponca City, for the Bar; Judge Fred B. H. Spellman, of Alva, for the judiciary; and Mrs. William N. Morgan, of Norman, representing the League of Women Voters, for the laymen. A stimulating open-floor discussion followed the panel presentation. Many prominent state laymen were in attendance and took part in the discussion.

An Oklahoma City Chamber of Commerce forum luncheon honored Judge Alfred P. Murrah, of Oklahoma City, who was recently appointed Chief Judge of the United States Court of Appeals for the Tenth Circuit.

John D. Randall, of Cedar Rapids, Iowa, President of the American Bar Association, was a speaker at the General Assembly.

An event long dreamed of by leaders of the Bar took place on December 3 during the meeting—the dedication ceremonies for the site of the new Oklahoma Bar Center at 18th and Lincoln Boulevard, just two blocks south of the State Capitol in Oklahoma City. Culminating many years of working and planning, the site was acquired following approval by the Supreme Court of the purchase. Brief but enthusiastic speeches were made by T. Austin Gavin, President of the Oklahoma Bar Foundation; John M. Holliman, President of the Oklahoma Bar Association; Robert W. Blackstock, Coordinating Chairman of the Oklahoma Bar Center Building Committee; Gerald B. Klein, past President of the Oklahoma Bar Foundation; William G. Farr, architect; Earl Q. Gray, campaign chairman; Russell Johnson, who handled negotiations for the purchase of the site; and Irvin E. Hurst, member of the Capitol Planning Commission.

A survey of the economic status of the Illinois lawyer is being taken by the Illinois State Bar Association. Comprehensive questionnaires were mailed to approximately 15,500 lawyers by the Association in mid-January and the results will be tabulated on data cards which can be processed by machines.

Gerald C. Snyder, of Waukegan, President of the Association, has announced that an "economic institute" will be sponsored by the Association to translate into a concrete program the measures needed to improve the profession's economic picture. The institute, which will include analyses of the survey results and sessions on fee computation and office practices, will probably be staged at the time of the Association's annual meeting at Illinois Beach State Park, on Lake Michigan, in June.

Officials of the Association claim the Illinois questionnaire is the most complete and best-constructed of any that have been used in the various economic surveys undertaken in the last few years. Original drafting of the questionnaire was done by George Traicoff, of Peoria, who then participated in final alterations with Mr. Snyder and the Association's full-time staff. The format adopted permits the answers to be readily transferred from the questionnaire to machine data cards.

The Illinois questionnaires were mailed to both members and non-members of the Illinois State Bar Association.

In talks throughout the state during his administration, Mr. Snyder has emphasized the importance to the public and the profession of upgrading the economic status of the lawyer. He has pointed out that the legal profession has failed to keep pace with the increased incomes of other professional groups and of self-employed persons generally. One of the tragic results of this is that the profession is becoming less attractive as a career. The profession itself is failing in appreciation of its own importance, he wrote recently, adding: "It is essential that the legal profession attract to its ranks young men of principle and ability. The maintenance of our liberties and our way of life will in great measure be in their hands. It is our duty to attract young men with the character, intelligence and industry necessary to maintain the ideals of our profession." He has also emphasized that a depressed economic condition does not provide the proper atmosphere for a fearless and independent Bar, which in turn is necessary to provide a competent judiciary for the administration of justice.

Fred A. Blanche, Sr.

The Ninth Annual Conference of Local Bar Associations of the Louisiana State Bar Association was held in Baton Rouge, December 11 and 12.

A highlight of the meeting was a two-part program sponsored by the state bar's Committee on Continuing Professional Education. The first part of the program was devoted to expropriation proceedings, and speakers discussed appraisal techniques, and the trial of an expropriation action from both the standpoint of the expropriating body and of the landowner.

The focus of the second half of the program was on the lawyer's office, and guest speakers explained the mechanics of managing the law office, the wage-hour problems of small businesses, and law-partnership agreements.

Alvin B. Rubin, Baton Rouge, chairman of the Louisiana Bar's Committee on Continuing Professional Education, has announced that the above program presented at the conference has been offered to local associations in Louisiana.

Another feature of the conference was a complete program, prepared by the Louisiana State Bar Association's Section on Local Bar Organizations, on the role and responsibility of local associations in state-wide projects and problems.

Members attending the conference heard a talk on their part in the state bar's new television series, a part of the program of the Bar's Committee on Public Relations, and saw a preview of the series which is devoted to the law and youth.

Other speakers on the program sponsored by the Section on Local Bar Organizations discussed the impact and effect of local bar support on state-wide bar programs, and the role and responsibility of local bars in the selection of judicial candidates and in the field of ethics and grievances.

Fred A. Blanche, Sr., Baton Rouge, President of the Louisiana State Bar Association, presided at the conference and at the meeting of the House of Delegates of the association which preceded the conference.

The Chicago Bar Association *Communicator*, No. 1 was dated November 1, 1959, has been issued. It is a newsletter, attractive in format, devoted to the activities of The Chicago Bar Association, published under the supervision of the Board of Managers. It carries interesting items on activities of the Association, including many which are of interest to every citizen in the state.

The Lafayette County (Mississippi) Bar Association held a business meeting at the Lafayette County Courthouse on January 3. The Association was formally organized by the adoption of a constitution and by-laws.

The following were elected officers for 1960: Phil Stone, President; C. B. Roberts, Vice President; and T. H. Freeland, Secretary-Treasurer.

On February 6, the new $390,000 home of the Queens County Bar Association, Jamaica, New York, was formally dedicated. It is located at the southeast corner of 148th Street and 90th Road (Lowe Court) in Jamaica. The ceremonies were attended by over 1,000 of its 2,100 members. The event was further celebrated at a festive Dedication Dinner Dance in the Grand Ballroom of the Waldorf Astoria Hotel in the evening. Twelve hundred of the Association's members, their wives and guests, crowded the Ballroom at the function which was officially the Association's 83d Annual Dinner.

The morning ceremonies were under the chairmanship of Bernard J. Ferguson, of Woodside, a past President of the Association. Formal dedication addresses were given by Charles K. Finch, of Long Island City, Supreme Court Justice Joseph M. Conroy, of Richmond Hill, and Official Referee Charles S. Colden, of Whitestone, all past Presidents of the Association.

The dignified two-story building will house the Association's free legal aid and lawyer referral services, and also will provide adequate and attractively appointed facilities for the Association's committee work, legal education program, round table conferences, business meetings and social activities. The library will be available to members for reference and research, not only during the day, but especially after hours.

Activities of Sections

SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW

Before packed morning and afternoon sessions in the Continental Ballroom of the Hotel Peabody, at the Southern Regional Meeting, in Memphis, November 12-14, the Section of Insurance, Negligence and Compensation Law presented a very outstanding program.

John J. Wicker, Chairman of the Section, presided at both sessions.

The morning session dealt with the "Preparation and Presentation of Marine Personal Injury and Death Claims". The speaker for the plaintiffs' case was Herbert J. DeVarco, of New York, New York, and the speaker for the defendants' cases was John L. Quinlan, also of New York, New York.

This program was followed by a discussion of "Life Insurance Policy and Ownership Problems", with Jac Chambliss, of Chattanooga, Tennessee, as the principal speaker.

At the afternoon session, the Committee on Trial Tactics, Charles E. Pledger, Jr., Washington, D. C., Chairman, presented a program "Drama in the Courtroom" with Alexander Holtzoff, United States District Judge for the District of Columbia, as moderator. The speaker for the plaintiff was Joseph M. Best, of Tulsa, Oklahoma, and the speaker for the defense was John C. Shepherd, of St. Louis, Missouri. Each program was enthusiastically received by a large audience. Robert M. Nelson, of Memphis, acted as liaison contact between the Southern Regional Meeting and the Section.

SECTION OF MUNICIPAL LAW

The annual meeting of the Municipal Law Section of the American Bar Association will be held in the Sheraton-Carlton Hotel commencing on Sunday, August 28. The meeting is being arranged by a local committee of prominent Washington lawyers headed by Brice Rhyne, counsel for the National Institute of Municipal Law Officers. A preliminary meeting of the local committee was held in January and it was decided to devote the Monday afternoon session to the problems of attorneys for the smaller municipalities.

Among the topics proposed for discussion at this meeting are matters of jurisdiction, incorporation and annexation, legislative standards in ordinance drafting and administration and recent developments in the field of local government law. It was decided that the various subjects would be presented by a panel consisting of at least two experts in the field. Since nearly all of the prominent authors in the field of municipal law are members of the Section, it is expected that this briefing session will have great value for municipal attorneys.

The Sunday afternoon meeting will be devoted, as formerly, to committee reports. On Tuesday the committee proposes to discuss the problems raised by the rapid urban growth. Both lawyers from Canada and Great Britain will be asked to comment on the solutions to this world-wide problem which have been proposed in their countries. The noonday luncheon speaker will be asked to speak on the topic of the responsibility of the national government in reference to urban problems with particular reference to the recent proposal for a new cabinet membership on urban problems.

SECTION OF CORPORATION, BANKING AND BUSINESS LAW

The Membership Committee of the Section, under the Chairmanship of E. Nobles Lowe, of New York City, together with his state chairmen in the fifty states, has inaugurated an active campaign for new Section members with gratifying results. By joining the Section before June 30, 1960, all new members will receive five issues of *The Business Lawyer*, published quarterly by the Section as a service to its members and devoted to current, practical problems in the fields of corporation, banking and business law.

The January issue of *The Business Lawyer*, copies of which are still available, is especially notable for its thoughtful and well-documented articles. Contributed by A. A. Berle, Jr., Louis O. Kelso and Alfred B. Carb are discussions on "Legal Problems of Economic Power: Some New Demands on the American Legal System", "Corporate Benevolence or Welfare Redistribution?" and "Peaceful Co-Existence in Industry". Lawyers interested in the Uniform Commercial Code will be well rewarded by reading the articles by Walter D. Malcolm on "The Uniform Commercial Code: Review, Assessment, Prospect—November, 1959", and by Peter F. Coogan on "Operating Under Article 9 of the Uniform Commercial Code Without Help or Hindrance of the 'Floating Lien' ".

Other notable articles are "United States v. Bethlehem Steel Corporation—A Judicial Interpretation of Section 7" by Richard J. Flynn, "The Travails of a Federal Law of Unfair Competition" by Philip J. O'Brien, Jr., "In Support of Cumulative Voting" by John G. Sobieski and "Investments of Life Insurance Companies: Some Practices, Some Problems, Some Predictions" by Ray D. Henson. The bank lawyers as well as the general reader will be particularly interested in the articles by Paul D. Lagomarcino on "Federal Income Taxation Shapes the Banking Structure and Competitive Relationships Within It", by Jon Magnusson on "Municipal Bond Buying by Fiscal Advisers", and by James J. Saxon on "Recent Banking Legislation". Reported in the issue is the panel discussion held at the Memphis Regional Meeting on "Where To Look for Money—A Financial Clinic for Lawyers" in which Robert C. Barker, Ray Garrett, Jr., Larry D. Gilbertson, John Hawkinson, Homer Kripke, Edward D. Smith and Erwin A. Stuebner participated.

OUR YOUNGER LAWYERS

Kenneth J. Burns, Jr., Chicago, Illinois, Secretary, Junior Bar Conference;
Elizabeth Elward, Washington, D.C., Editor;
Charlotte P. Murphy, Washington, D.C., Associate Editor

J.B.C. Traffic Court Program

The following is a report on the efforts of the Junior Bar Conference, in cooperation with the American Bar Association's Committee on Traffic Court Program, to improve the administration of justice in traffic courts throughout the country.

Almost from its beginnings, twenty-six years ago, the Junior Bar Conference has been active in the field of traffic court improvement. One of its early chairmen, James P. Economos, pioneered in this area and is now director of the Traffic Court Program of the American Bar Association. The J.B.C. has continued its work in this field and perhaps its most publicized accomplishment in recent years has been its sponsorship of the "Go To Traffic Court as a Visitor—Not a Violator" program, encouraging public-spirited citizens to visit their traffic courts, thereby stimulating interest in the problems involved in the administration of justice in traffic courts. J.B.C. efforts in this field continue today. However, this report deals with a part of the J.B.C. traffic court program which perhaps is not so widely known, the Vanderbilt Traffic Court Survey.

In 1957, during the administration of William C. Farrer, of Los Angeles, as Chairman of the Junior Bar Conference, the Automotive Safety Foundation made available to the Junior Bar Conference a grant of $10,000 for the purposes of accomplishing the following objectives:

(1) To stimulate interest among members of the legal profession and the general public in the improvement of the traffic court systems of their respective states;

(2) To survey the existing conditions in traffic courts throughout the nation and to survey the laws affecting these courts; and

(3) To bring about in the respective states by legislation, education, and other appropriate means, improvement in the administration of traffic courts.

The program was accomplished during the 1957 administration of Mr. Farrer and the 1958 administration of Bert H. Early, of Huntington, West Virginia. During the entire period, John S. Rendleman, of Carbondale, Illinois, was Chairman of the Vanderbilt Traffic Court Survey Committee of the Junior Bar Conference, named in honor of the late Chief Justice Arthur T. Vanderbilt, of New Jersey. Justice Vanderbilt was one of the vital leaders in the traffic court movement and was closely identified with the adoption of the notable sixteen Resolutions on Traffic Courts adopted by the Conference of Chief Justices of State Supreme Courts. The idea of the Junior Bar Conference continuing and expanding its work with traffic courts with the aid of the Automatic Safety Foundation grant was inspired largely through his efforts.

The first task of the J.B.C. in implementing the above goals was the organization of state committees. State chairmen of the J.B.C. Vanderbilt Traffic Court Survey were recruited. Care was taken in the selection of these key people, many of whom were already associated with traffic courts. A few were prosecuting and city attorneys. There were several traffic court judges and a justice of the peace, and many others had served previously in the J.B.C. traffic court "Visitor-Violator" program.

Since one of the important aspects of the program was the fact-finding project, it was deemed essential to furnish committee members in each state with comprehensive questionnaires relating to the many aspects of state and local traffic court structure. The questionnaires were developed by Mr. Rendleman and Professor George E. Warren, author of *Traffic Courts*, published by Little Brown & Company in 1944. The final product of their efforts in this area was a set of two questionnaires, one dealing with the problems of local traffic courts and the other pertaining to the problems of the state as a whole.

The support of the Conference of Governors was sought and obtained. The chairman of the Governors Conference, William G. Stratton, of Illinois, wrote to each of his fellow governors indicating that he had reviewed the program and hoped that each of them would give whole-hearted support to the program. Each governor was supplied with the name of the J.B.C. Vanderbilt Survey Chairman for his state, and ultimately forty-seven of the governors indicated their support of the program.

Regional meetings were conducted in Chicago, Denver, Las Vegas, New Orleans, Richmond and New York City. State chairmen attended meetings in their respective regions. Approximately 75 per cent of the states were represented at the six meetings, the purposes of which were to assure that the questionnaires were thoroughly understood and completed, that there were no misunderstandings concerning the program, to urge the establishment of state and local programs and to discuss the methods of achieving the purposes of the sixteen resolutions. The reception was enthusiastic, and the groundwork was laid for the accomplishment of the primary function of the committee—the fact-finding task of ascertaining existing conditions in traffic courts throughout the country.

J.B.C. representatives gathered facts about their state and local traffic court systems. They completed the questionnaires, furnishing additional data in many cases. A total of forty-three questionnaires were completed and returned, and information was obtained from fifty-eight cities and towns. Study of this information revealed that additional data were needed in some cases. These were sought and in the majority of cases, obtained.

The information obtained in this manner must of necessity be checked,

correlated and interpreted. It has been forwarded to Professor George E. Warren and will be useful to him in his work of revising *Traffic Courts* and will ultimately be distributed in that form.

The interest engendered by this program in many localities has resulted in tangible accomplishments. For example, the Idaho survey chairman, who also serves as a legislator in that state, agreed to sponsor a legislative program for traffic court improvement. In Illinois, the Junior Bar Section of the Illinois State Bar Association undertook the program as one of its projects. The Iowa State Bar worked actively to implement a number of resolutions within the state and has concentrated its efforts on an attempt to abolish the justice of the peace system. The Maryland survey chairman made contacts through his committee that are expected to result in a legislative program based on the sixteen resolutions.

The Automotive Safety Foundation grant made it possible for the J.B.C. to concentrate its efforts in the field of traffic court improvement. A tremendous fact-finding task was accomplished by means of the grant, and the Conference was able to expand the scope of its activities with traffic courts. Tangible improvement has and will continue to result from analysis of the data obtained and from steps to remedy the shortcomings in traffic court administration thus disclosed. Through this program, young lawyers and laymen throughout the nation have been made aware of many principles that are the foundation of just and efficient traffic court administration. The Automotive Safety Foundation deserves the thanks of the organized Bar for making this work possible.

J.B.C. Actively Engaged in Combating Unauthorized Practice

Almost fifty J.B.C. members have been appointed by Chairman Gibson Gayle to serve with James R. Sweeney, of Chicago, and his vice chairmen, on the Conference's Committee on the Unauthorized Practice of Law. The committeemen were selected upon recommendations from members of the Associate and Advisory Committee of the American Bar Association's Standing Committee on the Unauthorized Practice of Law and the chairmen of the state bar committees on this subject.

The purpose of this large committee will be to carry throughout the nation an educational program which will give senior law students soon to enter the practice of law a background in the meaning of unauthorized practice and how to prevent it.

Lectures to be given by outstanding members of the Bar to senior law students in law schools in every state are being planned, and the emphasis of these lectures will be on the dangers of young lawyers being drawn into unauthorized practice. Very often the young lawyer finds himself involved in the unauthorized practice of law before he realizes it. This is true especially if he associates with a corporation, real estate company, accounting firm, bank or other lay groups. Also to be stressed will be the importance of recognizing what unauthorized practice is, how it develops and the role of the organized Bar in combating it. Senior law students will learn of the ill effects of unauthorized practice and the need for the organized Bar to prevent it.

The program has had the continued support and assistance of the Association's Standing Committee on the Unauthorized Practice of Law, and its chairman, F. Trowbridge vom Baur. Mr. vom Baur has urged that at least one lecture be given each year to third-year law students in each law school.

Thus far, the lectures have been given in law schools in Washington, D. C., and Chicago. Arrangements are being made to carry the program into many other law schools across the country.

1960 Annual Meeting

Junior Bar Conference sessions at the 1960 Annual Meeting in Washington, D. C., will convene August 25.

The program will feature several noted and prominent speakers, and, from all indications, the 1960 Annual Meeting will be one of the finest ever held. An outstanding program for young lawyers and their wives is being planned.

All J.B.C. activities will be conducted at the Shoreham Hotel. Inasmuch as accommodations are limited, members planning to attend should request their reservations immediately. For reservations, write to the Registration Department, American Bar Association, 1155 East Sixtieth Street, Chicago 37, Illinois.

District of Columbia Tax Court Announces New Rules of Procedure

New Rules of Procedure, effective February 1, 1960, have been adopted by the District of Columbia Tax Court. Copies of the new rules may be obtained at the office of the Clerk of Court or upon receipt of a self-addressed and stamped envelope. Required postage is eight cents. No charge will be made for copies of the rules.

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe, Washington, D. C., Editor-in-Charge

DIVORCE: I know your firm never handles criminal and divorce cases except for the best people who pay well. The next time you stoop to get rich handling a good divorce case, make sure you read the comment in the December, 1959, *Virginia Law Review* (Vol. 45, No. 8, pages 1362-1373; $2.00; Charlottesville, Virginia) by Robert B. Wiles. It is a corker.

As those of us who handle marital settlements know, there is no sex in them. It's all taxes. Even the fee for the wife's attorney should be paid to her in cash so she can pay her lawyer and deduct from her income taxes the expenses of the marriage settlement.

What has recently happened, however, is that payments made to the wife not specifically allocated for the support of the children are being carved out of the agreement and taxed as income to the husband. This is a dreadful development and it behooves all of us to draw our marriage settlement contracts differently.

Mr. Wiles, who must be bucking for Internal Revenue Director, tells us the "liberal" view is expressed by the Ninth Circuit in the *Eisinger* case, 250 F. 2d 303, certiorari denied, 356 U. S. 913, where study of the agreement caused the Court to say that half of the payments were income to the husband. As analyzed, the wife was to receive $62.50 per week for herself and $31.25 per week for each child.

In deciding *Eisinger*, the Court distinguished the decision of Judge Medina in the *Weil* case, 240 F. 2d 584, certiorari denied, 353 U. S. 959, which Mr. Wiles calls the "strict" view. There husband agreed to pay wife $800 per month which was to be reduced to $200 if wife remarried. The Court refused to carve $600 a month out of the agreement and tax it as income to the husband. Also in *Deitsch* v. *Commissioner*, 249 F. 2d 534, where in the event of remarriage, the wife was to receive $150 a month for child support, the court refused to call it income to the husband.

There would seem to be an unresolved conflict between these views of the Second and Sixth Circuits and the decision of the Ninth Circuit in the *Eisinger* case that the Supreme Court of the United States will one day study. I regret to state that Mr. Wiles believes the *Eisinger* case correct, but if he is right I shudder to think how much the income of many separated families will be reduced. Nevertheless, the comment of Robert B. Wiles is very well done, and be sure to read it before you tell your secretary to copy your old form of separation agreement.

COOPERATIVE APARTMENTS: In *The Practical Lawyer* for November, 1959, there is a fine article by my good friend and former student, Edward G. McLaughlin, of the New York Bar, entitled "The Co-Operative Apartment Corporation". It tells you how to organize this increasingly popular way of dwelling, and a bang-up job Ed has done. No surprise to me from having known him so well at Cornell when he came back from the wars to marry the delightful Miss Elaine Conway and begin his legal career.

The piece of Edward G. McLaughlin is the first of four pieces under the general subject of "The How and Why of Real Estate Co-operatives". Following Ed McLaughlin's piece, Lester R. Bachner, of the New York Bar, writes on the all important point, "Tax Problems of the Co-operative Apartment"; Hervis Jervis, another New York lawyer, on "Problems in the Purchase of a Co-operative Apartment"; and, last but not least, New York lawyer Eugene J. Morris tells us about "Middle Income Co-operative Apartments".

This is but another example of how practical *The Practical Lawyer* is. This issue costs $2.00, but a year's subscription only $8.00 and three years $20.00. You write 133 South 36th Street, Philadelphia, Pennsylvania. As you know, *The Practical Lawyer* is sponsored by both the American Law Institute and our Association.

PRESIDENTIAL INABILITY: The Constitution of the United States provides:

> In case of the removal of the President from Office, or of his Death, Resignation or Inability to discharge the Powers and Duties of the Said Office, the *same* shall *devolve* on the Vice-President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, *both* of the President and Vice-President, declaring what officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected [emphasis supplied].

When, within a month of his inauguration, William Henry Harrison died in 1841, John Tyler became "President". Daniel Webster advised that the word "devolve" gave Tyler, as Vice President the office, and on the first papers he signed, Tyler scratched out the word "Acting" from "Acting President".

The precedent set by Tyler has been followed by all the other Vice Presidents who succeeded on the death of the President. On the assumption that Andrew Johnson became President and not an Acting President on Lincoln's death, Chief Justice Chase presided at his impeachment trial and freed Ben Wade to vote for Johnson's impeachment. On the same assumption, the great Fessenden of Maine cast one of the vital nineteen votes by which Johnson escaped impeachment, because if Johnson had become President, Stanton was out of office one month after Lincoln's assassination. Millard Fillmore, Andrew Johnson, Chester A. Arthur,

Theodore Roosevelt, Calvin Coolidge and Harry S. Truman were all Vice Presidents who became Presidents.

Although the Supreme Court of the United States has never construed it, the presidential inability clause has been read to mean that the Congress cannot determine presidential succession unless "*both*" the President and the Vice President are dead. Currently, Congress has provided then, that Sam Rayburn, as Speaker of the House, becomes Acting President, followed by the President Pro Tem of the Senate and Cabinet officers starting with the Secretary of State. Professor William Winslow Crosskey of the University of Chicago Law School argues that this power to name successors is greater and if the President does not forfeit his job on disability to the Speaker, he should not to the Vice President.

In the case of the congressionally designated successors, the presidential inability clause specifically provides that the Speaker of the House "shall act . . . until the Disability be removed, or a President shall be elected". The clause says nothing with respect to the Vice President, but Professor Crosskey and others argue it was unnecessary to do so because in the eighteenth century a "Vice" officer was understood to be a ready substitute for the President. For this reason, Crosskey suggests that the Committee on Style, in writing the clause, eliminated from the draft specific language as to the succession of the Vice President. He also points to Section 3 of Article I of the Constitution which provides the Senate,

> shall choose . . . a President pro tempore in the Absence of the Vice President *or when he shall exercise the Office of President of the United States.*

To Crosskey, under the presidential inability clause as written, on the disability of a President, the Vice President becomes merely an Acting President and the President gets his job back when the disability is removed. The scholars to a man agree with Crosskey, but the precedent set by Tyler caused the Republican Chester A. Arthur to refrain from seeking the Presidency when Garfield lay eighty days in a coma. It also caused Democrat Thomas Marshall, the lovable Hoosier (who said what the country needs most is a good five cent cigar), to refrain from seeking the Presidency after Wilson's collapse on September 25, 1919, until the end of his term on March 4, 1921. In other words both Chester Arthur and Thomas Marshall were as weak as Caspar Milquetoast in the funnies and Alexander Throttlebottom in *Of Thee I Sing*. Nor did the Republican Cabinet of Garfield nor the Democratic Cabinet of Wilson take any action. In fact, in a lucid moment, Wilson fired Secretary of State Lansing for calling twenty-one cabinet meetings without his or Marshall's direction.

It is said the affairs of the country suffered during the incapacity of both Garfield and Wilson, and the thought is things would be different if the Constitution were amended so as to provide specifically that on disability of the President, the Vice President becomes merely an Acting President. Along with this, provisions are sought for the determination of when the disability of a President begins and ends.

The question is not new. On August 27, 1787, John Dickinson, of Delaware, and Hugh Wilkinson, of North Carolina, read the presidential inability clause and asked "What is the extent of the disability?" and "Who is to be the Judge of it?" It was after this date that the Constitutional Convention expanded the judiciary clause (Article III) to permit the federal courts to hear "all cases in law and Equity, arising under the Constitution of the United States". Since *quo warranto* is an ancient writ by which to test the right to hold office, Professor Crosskey argues that this expansion of Article III caused Dickinson and Williamson to accept the presidential inability clause as written. Under Crosskey's view, the federal district court, subject to review by the Supreme Court of the United States, is the sole judge of presidential inability.

Crosskey is opposed by his old Yale classmate, former Attorney General Brownell who, in his testimony during the 85th Congress before the Special Subcommittee of the House Judiciary Committee of Emanuel Celler, said:

> I believe the Constitution now vests the power of determining inability in the Vice President and that the Vice President could not constitutionally be divested of this power without a constitutional amendment.

Because the question is a political one, like gerrymander, both Attorneys General Brownell and Rogers have expressed the view that the Supreme Court of the United States would feel itself bound to accept the decision of the Vice President.

This view of the constitutional power of the Vice President was challenged before the Celler Committee by the Committee on the Federal Constitution of the New York State Bar Association of which Martin Taylor is Chairman. The other members are Elihu Root, Jr., and Arthur H. Dean.

Besides Crosskey, who believes the federal judiciary have the power in case of a dispute between the President and the Vice President (even though because of *Marbury* v. *Madison* we would need a constitutional amendment to give the Supreme Court original jurisdiction) and Attorneys General Brownell and Rogers who believe the Vice President alone is the Judge, there are others, such as Arthur Krock of the *New York Times*, who believe the Congress has power to establish a presidential inability commission to determine it.

When the discussion began it was the fashion to suggest the Chief Justice and other members of the Supreme Court of the United States as members. This popular pastime went on until one day when Wibb Middleton, of the Rochester Bar, read that wonderful chapter of Professor Mason's in his life of Chief Justice Stone with respect to extracurricular assignments for Supreme Court Justices. (*Harlan Fiske Stone* by Alpheus Mason, 1956, The Viking Press.) You remember that the Tilden-Hayes Election Commission counted Tilden out 185 to 184 by accepting without inquiry certificates from the carpetbag Governors of South Carolina, Florida and Louisiana that Hayes was the choice of their voters. On that Commission, voting strictly in accordance with party lines were five Supreme Court Justices: Field and Clifford, Democrats, and Bradley, Miller and Strong, Republicans. Bradley had been selected by the other four and afterwards poor Bradley was hanged in

effigy at Monticello, New York, between Miller and Strong. A sign on Bradley read: "I am crucified between two thieves." Bradley thereafter was said to cut himself off from all callers, refrain from reading the newspapers and even opening his personal mail.

At Wibb Middleton's suggestion, now Senator, then Congressman, Kenneth Keating, wrote Chief Justice Warren inquiring whether he or any Court member would serve on a presidential inability Commission. The answer was an emphatic "no" "because of the separation of powers in our Government, the nature of the judicial process [and] the possibility of a controversy of this character coming to the Court".

The matter is now before the Kefauver Constitutional Amendment Subcommittee of the Senate Judiciary Committee. A Senate Joint Resolution (S. J. Res. 40) introduced into the first session of the 86th Congress by Senators Kefauver, Dirksen and Hennings proposes a constitutional amendment. Under it, the Vice President with written approval of the heads of the executive departments can become an Acting President upon the disability of the President. Seven days after the President declares his inability has terminated he gets his job back, but if the Vice President, with written approval of the heads of the executive departments, transmits to Congress his written declaration that the President's inability has not terminated, the Congress (if in session, or if in recess at the call of the Vice President) considers the issue. If Congress by concurrent vote of two thirds of its members decides that the President's inability has not terminated, the Vice President remains in office. Thereafter, the Vice President remains Acting President until he declares the President's inability has ended or the Congress by concurrent resolution adopted by a mere majority vote does so or the President's term ends.

Various bar association committees have been considering this whole matter. The New York State Bar Association opposes S. J. Res. 40 and suggests a constitutional amendment under which the Congress will have the power to provide by law as to how the commencement and termination of presidential inability shall be determined. It wants the details left to Congress and not embalmed in the Constitution.

S. J. Res. 40 in Section 4 provides that the Congress shall act by means of a concurrent resolution. This raises problems. In a thoughtful report, Richard W. Hogue, Jr., of the Committee on Federal Legislation of The Association of the Bar of the City of New York, points out that Clause 3 of Section 7 of Article I of the Constitution provides:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives according to the Rules and Limitations prescribed in the Case of a Bill.

Mr. Hogue notes that despite this constitutional provision that S. J. Res. 40 permits the Vice President to be ousted by a mere majority vote by concurrent resolution. The provision is made on the theory of the Senate Parliamentarian ("Senate Procedure: Precedents and Practices" by Charles L. Watkins and Floyd M. Riddick, 1958, Government Printing Office, pages 167-168) that concurrent resolutions are not used for legislative purposes and accordingly are not required to be presented to the President.

Along with the New York State Bar Association, Mr. Hogue's Federal Legislation Committee of The Association of the Bar favors a constitutional amendment empowering the Congress to determine the commencement and termination of presidential inability but opposes freezing the machinery into a constitutional provision. No doubt this view is prompted by our experience under the Eighteenth Amendment that prohibited the sale of alcoholic beverages rather than empowering Congress to regulate them.

The valuable hearings in the 85th Congress before the Celler Committee in the House and the Kefauver Committee in the Senate and S. J. Res. 40 are available free on request from Congressman Celler or Senator Kefauver or the Document Rooms of the House and Senate. Former Attorney General Brownell has written a splendid piece telling in detail the development of the various proposals of the Administration (68 *Yale Law Journal* 189-211, December, 1958, No. 2; 401 A Yale Station, New Haven, Conn.; price $2.00). Edwin L. Gasperi has written a valuable article in the *New York State Bar Association Bulletin* for July, 1959 (address it at Albany, N. Y., no price stated). In addition, the New York State Bar Association reports are available at its Albany office on request and The Association of the Bar (42 West 44th St., New York 36, N. Y.) will send you the excellent study of the Federal Legislation Committee of which Richard W. Hogue, Jr., is Chairman. Also the able and distinguished Assistant Attorney General in charge of the Civil Division, George Cochran Doub, gave a valuable speech on this subject to the Maine Bar Association at Rockland, Maine, on August 27, 1959, and you can obtain a copy by writing him at the Department of Justice, Washington 25, D. C.

Notice by the Board of Elections

The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1960 Annual Meeting and ending at the adjournment of the 1963 Annual Meeting:

Arizona	Nebraska
Connecticut	New Jersey
District of Columbia	Oklahoma
Illinois	Puerto Rico
Iowa	South Carolina
Maine	South Dakota
Michigan	Texas
Mississippi	Washington
Montana	Wyoming

A State Delegate will be elected in Massachusetts to fill the vacancy for the term ending at the adjournment of the 1962 Annual Meeting.

A State Delegate will be elected in Rhode Island to fill the vacancy for the term ending at the adjournment of the 1961 Annual Meeting.

Nominating petitions for all State Delegates to be elected in 1960 must be filed with the Board of Elections not later than April 1, 1960. Petitions received too late for publication in the April issue of the JOURNAL (deadline for receipt March 1) cannot be published prior to distribution of ballots, which will take place on or about April 11, 1960.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1155 East 60th Street, Chicago 37, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M., April 1, 1960.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such state.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Any member of the Association in good standing in a state where the election is being held is eligible to be a candidate. There is no limit to the number of candidates who may be nominated in any state and nominations are made only on the initiative of the members themselves. While more than the required minimum of twenty-five names of members in good standing may appear on a nominating petition, special notice is hereby given that no more than twenty-five names of signers of any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

BOARD OF ELECTIONS
Walter V. Schaefer, Chairman
Harold L. Reeve
Robert B. Troutman

The Techniques of Reform

(Continued from page 281)

> Arguments from convenience and injustice sometimes tend to show the lawmakers' intention. But there is reason to fear, that, in this country as well as in England, the favor with which some statutes, and the dislike with which others, have been regarded by courts, have enlarged the distinction between strict and loose construction, without reference to the legislative intent, and introduced a variable standard that exposes the province of the legislature to judicial invasion.[53]

One reform which Judge Vanderbilt pushed with great vigor, the pretrial conference,[54] was unknown in Doe's day, but had he been familiar with it he would have endorsed it wholeheartedly. He had little use for the formalities of the courtroom and jettisoned such trappings as the term opening invocation by a clergyman, the bailiff's sonorous proclamation at the beginning and end of each half-day session, and the time-honored custom of the sheriff escorting the judge from his hotel to the courthouse with a drawn sword.[55] Anything which did not contribute to the swift dispatch of business Doe could not tolerate; anything which did he utilized to the utmost. Thus he often appointed referees[56] and undoubtedly would have welcomed the pretrial conference. As it was he did set some sort of a record in pretrial work. Once a preliminary hearing on a divorce case was scheduled for his hotel room. On leaving dinner he encountered the petitioner and the witnesses, invited them into his room, questioned them, and sent them home. Some time later counsel arrived, apologized for the delay, and requested a postponement because he couldn't find his client or the witnesses. "I have seen them", said Doe, "and granted the divorce."[57]

Other reforms sought by Vanderbilt which Doe would have endorsed were his attempts to raise the quality of the Bar and improve the caliber of the Bench.[58] Doe was the first chief justice in New Hampshire to organize a permanent, state-wide committee to supervise admissions to the Bar and he laid down rigid norms of professional

53. *Brown v. Whipple*, 58 N. H. 229, 233 (1877).
54. Vanderbilt, *op. cit. supra*, note 5, at 63-6.
55. In matters of formality the two men differed sharply. Doe, for example, refused to wear a robe; Vanderbilt encouraged his judges to wear them.
56. Vanderbilt did not approve of referees, not only because they were expensive, but because, unlike Doe, he thought them "another ancient source of untold delay". Vanderbilt, *op. cit. supra*, note 5, at 92.
57. Eastman, *op. cit. supra*, note 6, at 248.
58. See Vanderbilt, JUDGES AND JURORS: THEIR FUNCTIONS, QUALIFICATIONS AND SELECTION (1956).

conduct for attorneys whom he regarded as "public officers".[59] Doe took great interest in all young lawyers (even to the extent of offering Wigmore advice on choosing a wife)[60] and encouraged promising boys of moral character to study law. The most notable example is Robert G. Pike, a civil engineer who was surveying the road that ran by Doe's house one afternoon when the Judge came out to talk with him. Doe was impressed by Pike, told him he was the type of young man he wanted to see at the New Hampshire Bar and invited him to become a student in his office. Pike accepted the offer and justified Doe's expectations, succeeding to his place on the Supreme Court when he died, and eventually being appointed the second Chief Justice of the newly formed Superior Court.

Doe agreed with Judge Vanderbilt that appointments to the Bench should be bipartisan. When Vanderbilt observed that this has been done in New Hampshire only since the last decades of the nineteenth century[61] he may not have been aware that the reform was effected through the personal influence of Judge Doe (who several times threatened to resign if Democrats weren't appointed)[62] over the combined opposition of both political parties. Doe was often exasperated by the difficulty of getting good men to serve[63] and of persuading politicians to appoint them.[64] Vanderbilt noted that New Hampshire has sought to maintain a geographical balance on the court.[65] Doe did not favor this policy. When the appointment of Frank Parsons, later Chief Justice of the state, was opposed because he came from the same rural town as a judge already on the Bench, Doe helped persuade the Governor to name him by observing, "The choice of a justice of the supreme court is not a matter of location but of ability and fitness for the office."[66]

Selection of Judges

Doe would not have sympathized with Vanderbilt's efforts to reform the method of selecting judges, first because he would not have understood the evil Vanderbilt was seeking to overcome, and secondly because he would not have appreciated the value of the tool Vanderbilt intended to use. He would not have understood the evil because New Hampshire judges have never been elected and the abuses that have crept into the "democratic" system were not so widely publicized when he was alive. It is a situation which Doe never had to face. His greatest problem with politicians was to persuade them not to "reform" the court whenever one party swept the other out of office. In this he failed. Thus in 1874 when the Democrats gained control of the state government they "reformed" the court by removing Doe and most of his colleagues. Two years later Doe became Chief Justice when the Republicans returned to power and "reformed" the Democratic Bench.[67]

Even if New Hampshire had popularly elected its judges Doe would not have appreciated Vanderbilt's plan of using the bar association as an instrument for overcoming the weaknesses of the elective system.[68] In Doe's time bar associations bore little resemblance to the semi-official, social-minded organizations of today. In fact, far from being concerned with placing independent men on the Bench, the first bar association in New Hampshire was formed partly to drive Charles Doe off. The precisian, preservative, Democratic lawyers of Grafton and Coos counties had discovered that the main attribute they had in common was their distaste for Doe and they devoted their first two meetings to outrageous attacks upon him.[69] Vanderbilt lived in a different era. His chief problem was to convince the organized Bar of the needs for reform, and not, like Doe, to combat attempts to dominate or dulcify the Court.

One other change which Vanderbilt sought and which Doe would have opposed had nothing to do with the times they lived in, but rather reflected a basic difference in judicial attitudes. Vanderbilt decried the tendency of American judges to remain aloof from jury trials and felt the ancient English practice of allowing the judge to comment on the evidence and to interrogate witnesses should be reinstated here.[70] Doe emphatically disagreed. He believed many of the presumptions which cluttered the law of evidence stemmed from unwarranted usurpations of the jury's fact-finding function by English judges of long ago who had been too free with their comments. Hence he overturned the *McNaghten Rules* (which determine mental responsibility by limiting the issue to the respondent's knowledge of right and wrong) on the theory that what had originally been a scientifically invalid assumption expressed by Hale and Coke in their jury charges had, over the years, evolved into an unsound and unreasonable rule of law.[71]

Doe would have concurred with Vanderbilt's statement that "judicial reform is no sport for the short-winded or for lawyers who are afraid of tem-

59. *Delano's Case*, 58 N. H. 5, 6 (1876).

60. Letter from Charles Doe to John H. Wigmore, July 9, 1889, in Pike, *President's Address: Memories of Judge Doe*, 3 Proc. N. Hamp. Bar Assn. 463, 478 (1916).

61. Vanderbilt, *op. cit. supra*, note 58, pages 39-40, note 45.

62. Letter from Charles Doe to Isaac Blodgett and George A. Bingham, November 6, 1880, Mss. 880606 Dartmouth College Archives. Doe used the same threat to force the Republican legislature to authorize an additional judge when he warned the party was in danger of being accused of failing to provide adequate justice. "It will be nothing to me more than to any other citizen. On the 15th of Aug. I shall retire to my family & my books which this works compels me to abandon." Letter from Charles Doe to William E. Chandler, August 3, 1877, Chandler Collection, New Hampshire Historical Society.

63. "Those who are fit will not accept; & those who will accept are not fit." Letter from Charles Doe to William E. Chandler, June 25, 1877, Chandler Collection, New Hampshire Historical Society.

64. "The whole state is shouting, with one voice loud enough to be heard in Warner 'Chandler! name your man!'" Letter from Charles Doe to William E. Chandler, July 3, 1877, Chandler Collection, New Hampshire Historical Society.

65. Vanderbilt, *op. cit. supra*, note 58, at 39-40.

66. Plummer, *Remarks at the Celebration of the Birthday of Frank Nesmith Parsons*, 5 Proc. N. Hamp. Bar Assn. 157, 158 (1925).

67. Both Doe and Vanderbilt were Republicans. Doe was a "regular" party man while Vanderbilt was a leader of the "clean-government wing" of the Essex County G.O.P.

68. Vanderbilt, *op. cit. supra*, note 5, at 30; Vanderbilt, *op. cit. supra*, note 58, at 46-7.

69. For samples of these attacks see the account of the first annual meeting in 1 Proc. Grafton & Coos Bar Assn. 44 (1889). Thirty years later Chief Justice Parsons recalled these meetings and remarked: "All that was said did not go into print. The address of the principal speaker is not among the printed proceedings. All the reference to it is by one of the speakers at the banquet who complained that the orator of the day had stolen his abuse of the court. At that time one great advantage of a bar meeting seemed to be the opportunity it furnished to express something more than friendly criticism of the judges." Parsons, *op. cit. supra*, note 23, at 210. For a toned down version of the principal address see, Metcalf, ed., Memorial of Hon. Harry Bingham, LL.D. 240 (1910).

70. Vanderbilt, *op. cit. supra*, note 22, at 113, 146.

71. *State* v. *Pike*, 49 N. H. 399, 408 (1870) (concurring opinion). Despite oft-repeated comments to the contrary, Doe's insanity doctrine is not the same as the District of Columbia's *Durham* rule. See Reid, Understanding the New Hampshire Doctrine of Criminal Insanity, 69 Yale L. Jour. 367 (1960).

porary defeat".[72] A majority of New Hampshire lawyers fought him every step of the way,[73] sometimes out of self-interest,[74] and the resistance was often so stormy that Professor Jeremiah Smith felt it would have induced weaker judges "either to submit to the old regime or resign their office in despair".[75] Vanderbilt also encountered strong opposition, but he too possessed a stubborn streak of perseverance, and succeeded in winning over renitent or procrastinating colleagues by tact and persuasiveness, the result being that, as with Doe, many of his original critics became his admirers.[76]

Conclusion

The differences between Chief Justice Doe and Chief Justice Vanderbilt can be explained, in part, by the fact they lived during different eras and practiced in different types of states. Doe's New Hampshire was rural, hence he encountered many petty cases, sometimes drafting writs of replevin to recover cows worth ten dollars. Vanderbilt's New Jersey was industrial, hence he was retained by such vast corporations as Pepsi-Cola (yet managed to be tagged a "Communist" by Mayor Frank Hague for defending Norman Thomas' right to speak). The law which Doe practiced was highly personal, for trials were well attended and many lawyers such as Republican Gilman Marston and Democrat Harry Bingham, though themselves good friends, had bands of admirers whose rivalries and tantrums remind one of the followers of Callas and Tebaldi at Milan's La Scala. The law which Vanderbilt practiced was more scientific and was concerned with crime detection, administrative regulations, statutes and legal aid, so that the prestige of a lawyer seeking to formulate policy often depended on his qualifications as an organization man, as a joiner of clubs, a server on committees, and his vehemence as a member of the bar association.

In the serene placidity of New Hampshire's shire towns equity seemed to Doe the overriding concern of the law. In the bustling, noisy, teeming atmosphere of New Jersey's cities the efficient, swift and direct administration of the court's daily functions seemed to Vanderbilt the greatest need of his day. Thus by necessity, training and inclination they turned to different methods to effect their reforms. Vanderbilt's were advanced in citizen meetings, political action, judicial conferences and press releases. Doe's were formulated in agrestic courthouses, personal influence, private persuasion, and in often surprising, slightly heteroclite, and sometimes cataclysmic opinions crammed between the covers of the official reports. Thus it is little wonder that Vanderbilt's great work was accomplished through his reputation as past President of the American Bar Association and by the influence of his lectures and books. Doe, who refused to join any organization or even write an article explaining one of his most cherished reforms,[77] achieved all his coups while on the Bench. Vanderbilt doubted if such a thing were possible (at least in a large state)[78] and turned to the legislature and to the people where his prestige resulted in laws effecting an integral court system and a delegation of the rule-making power to the court.[79] Doe felt statutes were unnecessary since procedure had been developed by the courts and could be reformed just as easily by the courts.[80] This flowed from his insistance that remedies were adjective and not substantive. It was Vanderbilt's theory that even "liberal" judges, that is those willing to overrule harsh and unreasonable precedents in evidence, torts and other fields of the common law, refuse to consider innovations in procedure and invariably fight as strenuously as any reactionary against the slightest changes in practice. Doe's career proves he was wrong.[81]

Because of the complexion of New Jersey and the congestion in its courts there was no aspect of judicial reform which Vanderbilt stressed more highly than administration. Doe probably never gave this a thought. Vanderbilt required every judge to fill out a weekly "time sheet", telling how many hours he sat, how many cases he heard, how far behind he was on decisions and how many litigations were awaiting trial. Had one of Doe's judges sent him such a report he probably would have consigned it to the waste basket. Vanderbilt's motto was "Organize, Delegate, Supervise";[82] Doe's was "Rationalize, Unravel, Improve". Vanderbilt sought to modernize the law; Doe sought only to humanize it.

Doe's admirers have insisted that he brought a flexibility to New Hampshire practice unequalled by any code state and thus forestalled legislative reforms. Although this claim has been echoed recently[83] as well as in his time,[84] it

72. Vanderbilt, *op. cit. supra*, note 8, page 9, column 1.

73. For instances of the opposition to Doe see Eastman, *op. cit. supra* note 6, at 247; Pike, *op. cit. supra*, note 60, at 467-70; and Smith, *Memoir of Charles Doe* 12-18 (1897); Smith, *Memoir of Charles Doe*, 2 Pub. So. N. Hamp. Bar Assn. 125, 134-40 (1899).

74. "'It was too often, when we hoped to attain results that our enlightened conscience did not approve, by arbitrary precedent and artificial rule that our legal education did approve, that we complained of his methods.'" Frink, *Charles Doe*, 2 Pub. So. N. Hamp. Bar Assn. 87-8 (1899).

75. Smith, Memoir of Hon. Charles Doe 12 (1897); Smith, *Memoir of Charles Doe*, 2 Pub. of So. N. Hamp. Bar Assn. 125, 134 (1899).

76. Spingarn, *Arthur T. Vanderbilt: Order in the Courtroom*, 212 Harper's Magazine 61, 63-4 (1956).

77. Doe declined an editor's request that he defend his assault on the *McNaghten Rules* by saying: "In my young days I adopted a resolution to abstain from everything but the study and administration of the law and to carry the practice to such an extreme as not to use my name, or allow it to be used, in anything outside my regular daily occupation... I must beg pardon for adhering to it notwithstanding my entire concurrence in your enterprise, and my ardent interest in your success." Letter from Charles Doe to Clark Bell, January 10, 1889, in Bell, Editorial: *The Right and Wrong Test in Cases of Homicides by the Insane*, 16 Medico Legal J. 260, 262-3 (no date).

78. "...I hazard a guess that real judicial reform will not come in any large jurisdiction by any other method than direct appeal to the people." Vanderbilt, *op. cit. supra*, note 8, page 9, column 1.

79. Vanderbilt's movement to take the rule-making function from the legislature (where David Dudley Field had placed it) and restore it to the courts undoubtedly received impetus from Doe's successful example. Judge William B. Hornblower, of New York, is quoted by a Virginia committee on judicial reform as saying: "Under the principles of the common law and by rules of court, Judge Doe worked out his radical reforms in the procedure of New Hampshire, and the power to regulate details of practice should be restored to the Courts where it originally resided." Quoted in Parsons, *op. cit. supra*, note 23, at 211.

80. *Boody v. Watson*, 64 N. H. 162 (1886).

81. On the other hand it has been suggested that Doe proves the reverse argument; that judges are more likely to effect changes in procedure than in substantive law: "But Doe's innovations in substantive law were less numerous and probably less significant than his sweeping reforms in adjective law. This may be attributed not only to the greater need for stability in substantive law, but to the relative expertness of judges in procedural matters, which makes utilitarian reform easier for them there." Note, *Doe of New Hampshire: Reflections on a Nineteenth Century Judge*, 63 Harv. L. Rev. 513, 518 (1950).

82. Niles, *Arthur T. Vanderbilt: His Institutional Sense*, 32 N. Y. U. L. Rev. 1168 (1957).

83. "His special genius lay in the fact that New Hampshire through him was able to accomplish judicially what other jurisdictions had to achieve by a multiplicity of procedure and practice codes." 63 Harv. L. Rev. 513, 515 (1950). "Indeed Doe's achievements in procedure are a striking testimony to what a masterful personality, joined with sound legal instincts and thorough knowledge of the traditional legal materials, may do in the way of practical law reform by judicial decision alone, without the aid of legislation." Pound, Interpretations of Legal History 139 (1930).

84. *Supra*, notes 34 and 35.

would be an exaggeration to say Doe "saved" New Hampshire from becoming a code state, because, in all probability, the hesitant, pressure-ridden, megatherian legislature would have bowed to the dictates of the organized Bar and would have refused to respond to the reformers' demands for a modern procedure code. But it can be said Doe did spare the common law of New Hampshire this otherwise inevitable attack by the reformers; that he made it efficient and flexible without the need for legislative interference—at least until now. If dissatisfaction with Doe's legacy should develop and the demand for a formal set of rules should materialize, it will probably be due, as much as to anything else, to the influence of Chief Justice Vanderbilt.[85]

85. That dissatisfaction may be developing in New Hampshire and that Vanderbilt's prestige and success may be influencing it, is demonstrated by a recent condemnation of New Hampshire's "piecemeal improvement" in which Chief Justice Vanderbilt is cited as an exponent of "comprehensive improvement". Letter from John M. Mullen to the Editor, January 16, 1959, in 1 N. HAMP. BAR J. (2) 46-47 (1959).

Personal Injury Recoveries

(Continued from page 277)

the establishment of agencies to handle the personal injury cases; yet, an accumulation of things like this may have just this result.

Taxes are complicated, but are they any more complicated than annuity and mortality tables, reduction to present worth or any of a hundred problems that courts and juries solve every day? From what the courts have shown thus far, the authors believe that this question should be answered in the negative.

Of more significance than the court decisions just stated are two matters which introduce considerable difficulty:

First, the theoretical measure of the loss of the plaintiff's earning capacity is that sum of money which if invested at a fair rate of return will yield annually the amount by which the plaintiff's earning capacity has been lessened and which will at the end of the plaintiff's life expectancy be reduced to zero.[30] This takes account of the fact that money earns interest each year; and it should be remembered that *this interest is taxable*. Therefore, if a court is going to use income after taxes as a measure of plaintiff's loss, it must add back the taxes which would be due on the interest earned—else the award would not fully compensate for the loss.

This requires the testimony of tax experts and it may be that the courts are trying to prevent a "parade" of these tax experts across the stand. But why should a court which can see nothing to complain of about plaintiff's producing an array of experts in anatomy, physiology, surgery and psychiatry, in life or work expectancy, and (if the court so requires) in reducing future anticipated earnings to present worth, find it improper for a jury to have a tax expert (or experts) make calculations which are the commonplace daily work of public accountants and tax lawyers? Besides, ways and means can readily be devised for rendering it unnecessary for juries actually to pass upon the figures submitted to them by such experts. For example, a jury *could* be required to state separately each item of damage and for those that reflect lost income; and a formula could then be applied (with the aid of a tax expert) that would reflect as nearly as is possible the impact of past and future taxes.[31] The authors do not urge this solution; it is mentioned simply to point out that if the courts would state their real reason for refusing this evidence, some system could no doubt be worked out which would meet the courts' objections and place the measure of recovery within the American notion of *compensation*.

Second, our problem may even be further complicated with a plaintiff who has income other than his salary or wage and that income is not terminated because of the injury. In this situation the court faces the added problem of determining whether it should consider the outside income when it allows introduction of the impact of taxes (or when it applies the "formula" mentioned above). Since, as is so by definition, the added income enjoyed by plaintiff does not depend upon his labor, but is derived from, say, investments, such income should, we submit, be completely ignored in a personal injury case. If the decision is that such evidence should be considered, our problem is more difficult for it then requires a determination of the possible size of that outside income during the continuance of the injury.[32] At this point the formula laid down by Britain's highest court in the *Gourley* case becomes unduly complicated. If, however, evidence as to such income is permitted, it would seem no more difficult to deal with it than with that derived from personal services. The same tax expert who calculates the present worth of future personal service earnings could make the calculations as to the plaintiff's investment income that is to be included.

There appears to be no single answer that solves all of the problems presented when the court decides to consider the impact that Section 104 of the Internal Revenue Code has on measuring the value of the decrease in plaintiff's earning capacity. Most American decisions, while certain and simple, violate the principle of compensation. Their unfairness is well stated in this sentence:

> It would be difficult to conceive of a more unjust, unrealistic or unfair rule than one which would lead a jury to base their allowance of reasonable compensation for the destruction of earning capacity on the hypothesis that no income taxes would be paid on net earnings.[33]

Such decisions also run the risk of engendering and contributing to a feeling on the part of the public that if these cases are too "hard" for a court to solve, then perhaps another tribunal could be devised that could handle them.

30. *Bartlebaugh* v. *Pennsylvania R. Co.*, 150 Ohio St. 387, 82 N.E. 853 (1948); 77 A.L.R. 1440; 154 A.L.R. 800. See also 105 A.L.R. 234 on "rate of return".

31. See approach in *Armentrout* v. *Virginia Ry. Co.*, 72 F. Supp. 997 (S.D. W. Va. 1947), *revd. on other grounds*, 166 F. 2d 400 (4th Cir. 1948).

32. This was the approach of *British Transport Commission* v. *Gourley* (1955) 3 All E.R. 796.

33. *Floyd* case, *supra*, note 23.

Most of the states have yet to pass on either of the problems raised in this article. Before an intelligent answer can be given to them, courts must distinguish between the questions involved when defendant seeks only to have the jury instructed that any award given will not be subject to income taxes now and when he seeks to introduce evidence of income tax liability on plaintiff's foreseeable future earnings to affect the size of the award. Denying both requests can have the effect of giving the plaintiff his taxes twice: once when gross income is used to measure the award and once when the jury adds taxes to the award, otherwise properly determined, on the erroneous notion that this is needed to compensate plaintiff. Whatever the decision on the second question, it is submitted that sound judicial administration requires the giving of the instruction discussed in the first portion of this article. Failure to do so cannot produce sound or defensible results.

The first few attempts by defense attorneys to draft such instructions have not, however, convinced some appellate courts that the jury might not reasonably have understood them to mean that it should *reduce* the award because no taxes are due now.[34] Such reduction can only be made where a loss-of-earnings component enters into the verdict and expert testimony has been received as to the extent of plaintiff's income tax liability on such earnings. However, once these problems are separated, it is hard to believe that the English language is not broad enough and precise enough to make the jury understand the true impact of the Internal Revenue Code on personal injury awards.

34. See *Maus* case, *supra*, note 18 and the following two Wisconsin cases: *Hardware Mutual Cas. Co.* v. *Harry Crow & Son., Inc.*, 6 Wis. 2d 396, 94 N.W. 2d 577 (1959); *Behringer* v. *State Farm Mutual Auto Ins. Co.*, *supra*, note 18. In the last case it was stated that "if the instruction is given, it should state not only that the jury is to add nothing to the award of damages because of non-liability for income tax but also that nothing is to be deducted from the award because of such factor."

Sound Economics Can Make Good Politics

(Continued from page 258)

total money supply in the country was a little over one quarter of the gross national product. At the end of World War II the money supply soared to about one half of the national product, thus making more money available to chase after the produced goods—but recently we have gotten back to a more normal ratio of less than one third. This, according to some economists, should act to substantially relieve inflationary pressures in times to come. But stability will occur only if our economic policies take advantage of these natural developments, not if we go contrary to them.

In addition to this natural development in our economy, which may considerably lessen the factors driving for inflation, more effective protection against inflationary pressures must be provided by a planned and coordinated program, requiring both governmental and private cooperation.

There have been some crash programs—designed to knock out inflation—which have contained one or more of the following suggestions: (1) stop government spending and deficit budgets; (2) abolish farm and other subsidies; (3) cut taxes; (4) tear down import barriers; and (5) break up large corporations and powerful unions. But in looking for means to stop inflation, we must make certain that we are not also knocking out our economic system and our way of life. For example: It is the national policy of this country to protect its citizens against unemployment. Unemployment carries a high price tag: in terms of broken homes, loss of self-respect and loss of national product. We cannot, therefore, undertake to curb inflation at the price of increasing unemployment. Likewise, we cannot stop inflation at the cost of substituting centralized planning and a totalitarian economy for our long existing and generally successful economic freedom. It must be further remembered that there is no magic in a stable price level. Naturally, stable prices going hand in hand with an expanding economy is the most desired situation. But stability of prices during the 1920's did not prevent a most catastrophic depression—and price stability may often conceal inequalities in the economic structure which may eventually upset the effective working of the whole economy. Our aim therefore must be price stability coupled with economic growth; price stability under which employment is full and the individual is free; price stability under which the economy is not unduly restrained.

Government Contributions To Stop Inflation

Government Spending. The oft-repeated proposal for cutting government expenditures does not offer a simple solution, since national security, increasing demands for government services and the dangers of unemployment necessitate certain levels of spending. But government enterprise should be more and more directed to those areas where additional federal expenditures will act to relieve depressed conditions and to reactivate idle labor and facilities—rather than increase pressures in areas where labor and facilities are already fully utilized.

Balanced Budget. A balanced budget does not offer a magic formula, since a balance could co-exist with unemployment and a slow rate of economic growth. But deficit financing is inflationary in nature, and although a balanced budget is not always attainable, we *should have it as often as we possibly can.* Balancing the budget will also go a long way psychologically in convincing the people that the Government is determined on fighting inflation.

Fiscal-Monetary Policies. The Government can help stabilize prices by tightening credit policies, and this has been one of the most effective means for combating inflation in England, in recent years. But naturally, we do not want a tight money policy which subordinates economic growth to stable prices, and which creates substantial unemployment. It is most essential that we have flexible monetary policies —designed to meet changing needs and to aid market adjustments. But the flexibility of such policies greatly depends on the government's own financial position: For government deficit budgeting may produce pressure on

the Federal Reserve System to follow an easy money policy, to assist in financing and refinancing government deficits.

Farm Subsidies. It has been said that supporting prices of basic farm commodities at "parity", is a potent source of inflationary pressure, while at the same time offering only temporary relief to farmers—since the basic farm problems remain unanswered. Because technological progress has tended to make the large commercial farm relatively efficient, 44 per cent of our farms now produce 91 per cent of the value of marketed farm produce. Quite often it is the affluent farmer that is being subsidized, while little help is going to the needy one. The rise in output per man-hour has in recent years been more rapid in agriculture than in the rest of our economy, but the farmer cannot be deserted because he has learned to be more efficient. Still, with government payments continuing to comprise 40 per cent of net farm income, and the federal-held surplus and pledged loans totaling more than $9 billion by the end of 1959, we must search for *more permanent, constructive and lasting* solutions for the farming sector of our economy. Developments to bring industry into the farm areas should be encouraged and relocation and retraining grants should be made available to assist the submarginal farmer desiring to enter more promising employment.

Cutting Taxes. Cutting taxes, unless we also produce an equivalent reduction in federal expenditures, will act to encourage inflation rather than to slow it down. But a reform of the tax system, with the main emphasis upon measures that will produce the means for financing research and modernization of our industrial machinery, is an important part of any effort to increase the efficiency of the economy and to keep costs and prices down.

Cutting personal and corporate income taxes and the modernization of depreciation laws are necessary developments, but as long as the people require more and more government services, and as long as international security requires tremendous expenditures, only minor relief can be expected in the total tax picture.

Foreign Trade. Foreign competition, it is said, can generally be expected to act as stimulus for the reappraisement of costs and prices, while high tariffs and import quotas help keep up domestic prices and shelter inefficiency and monopoly. It is quite probable that the United States can at times make its economy stronger by exposing its producers to *fair* competition from abroad. But modifications in a free trade policy are necessary in order to protect strategically essential industries, or to protect our economy against subsidized and unfair competition. Since cheap labor abroad coupled with effective new machinery and plants, to which we have contributed through our foreign assistance, may have adverse affects on our own economy—it may be necessary to study the further need for quotas. Still, if inflation in this country is harnessed there is no reason why we should not be able to compete favorably with other countries—both in our own and in foreign markets.

Curbing "Bigness". The efficiency, mobility and the power of our economy are directly related to its size. There is no crime in bigness, for a big country requires big business. Breaking up large corporations and powerful unions will not by themselves stop inflation. Breaking up unions in several parts, so there would be several unions in the same industry, would not have the intended results—for confusion, rivalry and union warfare would certainly not act to diminish the upward pressure on wages. Likewise, giving the job of big industry to a large number of uncoordinated and resources-poor entrepreneurs will not aid efficiency or lower prices.

But constant vigilance is necessary to make certain that competition becomes more vigorous and pervasive in American economy. The claims of "administered prices" in American industry, as well as the complaints of wage increases causing "cost-push" inflation, indicate that constant government attention must be directed to the maintenance of a competitive order both in industry and in labor. With labor income comprising some 62 per cent of the national income, it is evident that wages have a substantial impact on consumer prices, and thinking citizens will agree that anti-monopoly controls must apply to all kinds of private economic activities—whether carried on by industry, commerce, labor, professional associations, cooperatives or any other combines. Such controls, however, must not be exercised in a haphazard, fragmentary and disjointed manner. Creating a just and proper balance in our economy requires the production of a comprehensive program, well-coordinated and positive in approach, in which the legislative, administrative and judicial branches of the government must cooperate.

Public Initiative In Combating Inflation

Our economic system—to which we have been fondly referring, in recent times, as "People's Capitalism"—is dependent for its true success not on centralized direction and scrutiny of the Soviet type but on widespread creativeness, ingenuity and cooperation. "People's Capitalism" implies that the means of production are not merely in the hands of the few giants of industry, but are dispersed among large numbers of property holders, professional people, farmers, public servants and laborers. "People's Capitalism" does away with the discredited Marxist theories of capital-labor struggle, predicted to work the internal destruction of capitalism, and strives, instead, towards a closer "working partnership" between all the elements participating in the national production: capital, management and labor.

It is with the belief in "People's Capitalism" that I am calling for a *rapprochement* of management and labor—to plan together for the common and public good, and to work together against the destructive powers of inflation.

Management by enlisting the active cooperation of all employees, from top executives to the lowest of orderlies, can succeed in reducing the ratio of payroll expenses to sales revenues. "At the present time", we must agree with one expert commentator,

> only a few enterprises really succeed in gaining the active cooperation of their workers. Today the most important capabilities of the American workers, their imagination, their ingenuity, their ability to invent and to discover

shortcuts are rarely put to use because methods of management in most plants are not designed to bring out these qualities. Indeed, most managers have little conception how much ability is going to waste through not being used.

Encouragement of productivity through a system of bonuses, providing workers with additional pay whenever the ratio of payroll costs to sales is reduced, has proved effective in the industries that have tried it. Stock options to labor as well as management increase the sense of partnership. Still, the use of these procedures is not widespread enough and their more general adoption will depend on an increasing degree of mutual confidence and a change in some of the adversary philosophies of management and labor. I believe that these and other new management methods, designed to enlist all units of production in improved teamwork, hold great promise for checking rising costs.

Labor, likewise, must exercise statesmanship and restraint in its constant drive for higher pay and better working conditions. It must be remembered that higher labor pay may be almost totally cancelled out by the higher prices of the commodities that labor must buy. Some inflationary force has been previously provided by union-management bargaining in key industries, for although only less than one fourth of our workers are unionized—the effect of increased wages was often felt throughout the labor market. But the situation is now changing, and the developments in the steel strike indicate that the settlement is likely to produce no substantial increase in the price of steel. If the changed attitude in steel and auto negotiations will be heeded by other labor contracts, the increases in the cost of labor and the resultant impact on prices will be much more moderate in the early 1960's than it has been since the end of the war.

Generally, public encouragement should be given to the non-governmental sector of our economy in any of its endeavors to increase national productivity, to guide production into items with greater durability, less obsolescence and lower prices. For as the Chief Manager of the Union Bank of Switzerland put it recently:

> Higher productivity will be able to keep prices down and money sound, provided that management will finally feel the moral responsibility to pass technical progress on to the consumer in the form of lower prices.

I have, therefore, noted with full agreement the recent statement of Dr. Raymond J. Saulnier, Chairman of the President's Council of Economic Advisers, that in order to achieve general price stability, price reductions must be accomplished in the industries "where productivity gains are especially rapid". In fact, Dr. Saulnier urged both labor and management in those fields to forego part of the gains of productivity in the public interest; labor by accepting lesser wage increases than the productivity gains, and management by cutting prices instead of taking the productivity advances in higher profits. Thus, both labor and business should be urged to exercise better judgment and more responsibility in setting prices and wages consistent with general stability. And competition should be preserved in both products and in labor so as to limit the power of business and labor to set unreasonably high prices and wages. England and Germany are apparently finding solutions, cannot we—we reasonable Americans—exemplify our reasonableness by using good judgment?

Good Economics Will Make Sense

It has been said the term "inflation", like the term "rheumatism" at the turn of the century, covers a multitude of ailments. With the multiplicity of factors which contribute to inflation, it is obvious that no one "all-purpose pill" will cure it. We have listed the reforms that are needed in several fields, and it would be unrealistic if we forgot that there always are formidable obstacles to changes in public policy. Such comprehensive government and private sector policy to curb inflation may appear to present some difficult problems, because at first glance it may seem to pit the general interest in a stable dollar against many organized and vocal special interests. But I believe that the program outlined by me demonstrates that anti-inflation action can be taken without serious or lasting damage to

any of the constituent parts of American economy. Still, all these interests and groups must be educated to understand that their own welfare turns, in the long run, upon a strong and effective national economy, adaptable to change and capable of competing in the international market.

I believe that the essential first step in the campaign for a stable dollar is the restoration of the public confidence in the stability of our currency. A legislative statement proclaiming the goal of stabilizing the purchasing power of the dollar is one appropriate way of demonstrating government's determination to act.

The second necessary step is the development of an economic plan which will combine our desire for stability with our need for growth. A strong statement urging creative thinking on the economic future appeared recently in the *St. Louis Post-Dispatch:*

> There is not much doubt that the economy can be expanded rapidly if the federal budget is rapidly inflated. But to conclude . . . that we need only spend a lot more federal money fast is to ignore the crucial parts of the problem. How can we get a satisfactory rate of growth *without* inflation and *without* relying on a vast military

effort? ... Perhaps the answer lies in some kind of economic plan based on a controlled increase in creative public expenditures, accompanied by taxes to pay for them. Devising such a plan is the task of economic statesmanship, and putting it into effect the task of political leadership. Cannot our society generate the political and economic resources necessary to meet such a plain challenge? This much is certain: Unless we do meet this supreme challenge of our times, we shall see more and more peoples drifting toward Communism, fewer and fewer committed to the islands of freedom.

To help produce such a plan and to create better and high level coordination of the several departments and units of government in pursuing both stability and growth, I have introduced legislation for the establishment of a National Economic Council for Security and Progress. I am convinced that the economic challenge posed to the free world by international communism is one of the most serious aspects of the "cold war", and that this war may well be won or lost in the markets of the world and on the production line. The proposed Economic Council is patterned after the existing National Security Council, whose main functions are military, and is founded on the belief that planning economic security and progress is as important as planning military defense. Consisting of cabinet secretaries and other top-level government officers, it will be the Council's function to advise the President with respect to national and international economic development, and to enable the departments and agencies of the government to cooperate more effectively, amongst themselves and with private business, in matters relating to national economic developments and the role of America in world economy.

I should like to say this in conclusion: Let us restore the faith of the people and we would have taken the first step. But let us not fail to pursue a comprehensive and long-term program that will guarantee our citizens, young and old, working and retired, employed, self-employed, and employing others, the security and stability that are derived from knowing better what tomorrow will bring.

Eavesdropping and the Law

(Continued from page 266)

sion, without comment, the case of *Pennsylvania* v. *Nelson*[19] the case in which it had ruled that Pennsylvania's law against subversion was of no effect, because Congress had pre-empted the field. To those of us concerned with wiretapping and the protection of privacy this concluding citation was like a whip-crack. Or was it a time bomb? To wiretapper John G. Broady, then still out on bail appealing his New York conviction of two years before, it must have looked like a life-preserver in a hopelessly troubled sea. (As previously noted, that hope failed him in the Supreme Court.)

We shall now proceed to discuss the *Benanti* case, and the recent decisions stemming from it.

The Benanti Case and New York Courts

Salvatore Benanti was suspected of dealing in narcotics in violation of New York State law. A court order was duly obtained under New York law to tap the telephone of a bar he frequented. On May 10, 1956, police overheard a conversation of Benanti to the effect that "eleven pieces" were to be transported. The car was intercepted and found to contain not narcotics but eleven cans of alcohol without federal tax stamps. The case was turned over to federal authorities and a conviction was obtained before District Judge Lawrence E. Walsh, now Deputy Attorney General of the United States. The conviction was upheld unanimously by the U. S. Court of Appeals for the Second Circuit, under Judge Medina, although the court recognized that federal law had been violated through the wiretap. The Government's argument was that the wiretap occurred without the participation or knowledge of federal officers, and the Government, being without fault, should not be handicapped.

The Court's Interpretation of Section 605

In unanimously reversing the Court below, the Supreme Court rendered a decision by Chief Justice Warren in two parts, the first dealing with admissibility of evidence, and the second setting forth a thunderous declaration that New York's system of law enforcement wiretapping was in violation of Section 605 and against the intent and power of Congress. The entire opinion was based on Section 605, rather than any constitutional grounds. The Court specifically rejected an analogy to the Fourth Amendment.

As to admissibility, the Court relied on the line of the *Nardone* decisions that "the plain words of the statute created a prohibition against any persons violating the integrity of a system of telephonic communication and that evidence obtained in violation of this prohibition may not be used to secure a Federal conviction".

In the *Benanti* trial, the "existence" of a wiretap was revealed on cross-examination, and thereafter the prosecutor undertook to prove that the tap had been authorized by state law. The Supreme Court held that 605 had been violated, if not sooner, by the mere disclosure in federal court of this "ex-

19. *Pennsylvania* v. *Nelson*, 350 U. S. 497 (1956).

istence" and, furthermore, that this disclosure had influenced the jury. It would not permit indirect use of methods deemed "inconsistent with ethical standards and destructive of personal liberty".

"This case is but another example of the use of wiretapping that was so clearly condemned under other circumstances in the second Nardone decision . . ." said the Court.

So far, the *Benanti* opinion contained nothing startling, in view of the long-standing conflict between state and federal views on this matter, and the long-standing *dicta* of the Supreme Court on ethics and liberty. But Chief Justice Warren's two concluding paragraphs were so strong an assertion of congressional power and intent that I must quote them in full.

As an alternative argument, the Government had urged that there was no violation of 605 in this case because the wiretap was done by state agents acting under the state constitution and statute. As to this the Supreme Court said:

> Respondent does not urge that, constitutionally speaking, Congress is without power to forbid such wiretapping even in the face of a conflicting state law. *Cf. Weiss* v. *United States*, 308 U. S. 321, 327. Rather the argument is that Congress has not exercised this power and that Section 605, being general in its terms, should not be deemed to operate to prevent a State from authorizing wiretapping in the exercise of its legitimate police functions. However, we read the Federal Communications Act, and Section 605 in particular, to the contrary.

Following this strong statement, the Supreme Court concluded, lengthily, with assertions even stronger:

> The Federal Communications Act is a comprehensive scheme for the regulation of interstate communication. In order to safeguard those interests protected under Section 605, that portion of the statute pertinent to this case applies both to intrastate and to interstate communications. *Weiss* v. *United States, supra.* The natural result of respondent's argument is that both intrastate and interstate communication would be removed from the statute's protection because, as this Court noted in *Weiss*, the intercepter cannot discern between the two and will listen to both. Congress did not intend to place the protections so plainly guaranteed in Section 605 in such a vulnerable position. Respondent points to portions of the Act which place some limited authority in the States over the field of interstate communication. The character of these matters, dealing with aspects of the regulation of utility service to the public, is technical in nature in contrast to the broader policy considerations motivating Section 605. Moreover, the very existence of these grants of authority to the States underscores the conclusion that had Congress intended to allow the States to make exceptions to Section 605, it would have said so. In the light of the above considerations, and keeping in mind this comprehensive scheme of interstate regulation and the public policy underlying Section 605 as part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy. Cf. *Pennsylvania* v. *Nelson*, 350 U. S. 497; *Hill* v. *Florida*, 325 U. S. 538; *Hines* v. *Davidowitz*, 312 U. S. 52.

The very strong language of this concluding sentence of Chief Justice Warren's opinion was backed up by a footnote which made it even more emphatic, as follows:

> In passing, it should be pointed out that several Attorneys General of the United States have urged Congress to grant exceptions to Section 605 to federal agents under limited circumstances. See e. g., Hearings on H. R. 762, 867, 4513, 4728. 5096, 84th Cong., 1st Sess. 28; Rogers, The Case for Wire Tapping, 63 Yale L. J. 792 (1954). But Congress has declined to do so. In view of this, it would seem unreasonable to believe that Congress is willing to allow this same sort of exception to state agents with no further legislation on its part.

Thus spoke the Court on December 9, 1957. This made big headlines in the newspapers for a day or two, and a big continuing impact upon all of us who are concerned with wiretapping law. What effect would it have, and how would that be effected?

Since the Court's opinion was based upon Section 605, Congress obviously was in a position to settle doubts by stating its present intent with more particularity than it had undertaken twenty-five years ago. Indeed, Chairman Emanuel Celler, of the House Judiciary Committee, had been working on wiretapping for years, through a subcommittee; he proposed legislation recognizing state wiretapping for law enforcement, and permitting federal tapping in national security cases; but that legislation has got nowhere. Senator (former Representative) Kenneth B. Keating had for years urged comparable legislation. None of this legislation had ever reached the floor

of either house of Congress for action. The Supreme Court had now in Chief Justice Warren's final footnote, interpreted the Congress's failure to act as a positive declaration of intent.

More immediately, there was the question of how the New York State courts would react to the *Benanti* case. New York's Supreme Court Justice Samuel H. Hofstadter, long a strong critic of wiretapping, had no case before him but promptly issued a strong, solitary blast announcing he would issue no wiretap orders.[20] Whether any other judge privately followed his example, I do not know, but there seems to have been no diminution of New York wiretap orders.

Meanwhile in Westchester County, New York, the *Benanti* case so impressed County Judge Hugh S. Coyle that he felt its effect should be passed upon by higher courts; therefore, he dismissed a gambling case, based on wiretap evidence, against one Floyd Dinan and others; this was appealed to the Appellate Division, Second Department, which unanimously reversed Judge Coyle's order in December, 1958;[21] the reversal was unanimously affirmed without opinion by the Court of Appeals in April, 1959.

On the same grounds, Judge Coyle also reversed a conviction of Peter Variano for bookmaking, appealed from a police justice court; the Court of Appeals unanimously reversed him in a brief opinion in April, 1959.[22]

Thus New York's appellate judges have staunchly and unanimously defended the state's rule that wiretap evidence may be admitted, even though obtained in violation of federal law. They pointed out Chief Justice Warren's specific reference to *Schwartz* v. *Texas* in the *Benanti* case. The Appellate Division, in its opinion by Acting presiding Justice Henry Wenzel, also commented thus:

> In 1946, when the Court of Appeals first dealt with the question of whether wire tap evidence ought to be admitted in a proceeding in our courts in view of section 605, it did not overlook the consideration that section 605 was a substantive law forbidding disclosure or divulgence of evidence procured by wire tapping or the fact that the Supreme Court of the United States had ruled such evidence inadmissible in Federal Court proceedings (*Harlem Check Cashing Corporation* v. *Bell*, 296 N. Y. 15, 68 N.E. 2d 854). Thereafter, in 1952, the Supreme Court commented that the very introduction into evidence of wire tap evidence "would itself be a violation of" section 605, and that this is a "factor for a State to consider in formulating a rule of evidence for use in its own courts." (*Schwartz* v. *State of Texas*, *supra*, 344 U. S. at page 201, 73 S. Ct. at page 234). However, in the most recent case before the Court of Appeals on the subject, the court expressly answered that by stating that the rule of this State that the evidence is admissible "is not affected by the circumstances that requiring a witness to testify as to wire taps might force him to a criminal violation of the Federal Communications Act." *People* v. *Saperstein*, 1957, 2 N. Y. 2d 210, 215, 159 N.Y.S. 2d 160, 164; certiorari denied sub nom. *Saperstein* v. *New York*, 353 U. S. 946, 77 S. Ct. 825, 1 L. ed. 2d 856). Thus, the conclusion is inescapable that the Court of Appeals positively rejected the suggestion that the New York rule of evidence be changed.
>
> Nothing in the *Benanti* case, 355 U. S. 96, 78 S. Ct. 115, 2 L. ed. 2d 126, *supra*, can be viewed as casting doubt upon the firmness of the rule in New York as enunciated by the Court of Appeals . . .[23]

Thus the New York rule on wiretap evidence stands as a firmly defended fortification. But is it perhaps a Maginot Line? The disagreement of Justices Warren and Douglas as to whether to grant review in the *Dinan* case suggests that it may not be impregnable.

When convicted wiretapper John G. Broady undertook a flank attack on New York's law against wiretapping, based on the case of *Pennsylvania* v. *Nelson*, the Court of Appeals considered the question quite seriously—and not unanimously—in affirming his conviction.[24] Despite the refusal of the Supreme Court to hear Broady's plea, the New York Court's reasoning is of continuing interest, because of the importance of the *Nelson* case.

It was contended for Broady that Congress in enacting Section 605 had pre-empted the protection of telephonic privacy and therefore the New York prohibition against wiretapping offended the supremacy clause of the Constitution. Absurd as this might seem at first blush, the court did not treat it as such. Judge Charles W. Froessel, with the concurrence of Judges Conway, Dye and Van Voorhis, devoted more than one third of a lengthy opinion to argument rejecting the contention.

The three other judges disassociated themselves from this reasoning. Judge

20. In the matter of Interception of Telephone Communications, 9 Misc. 2d 121 (1958).

21. *People* v. *Dinan*, 7 App. Div. 2d 119, 181 N.Y.S. 2d 122 (1958).

22. *People* v. *Variano*, 5 N. Y. 2d 391, 185 N.Y.S. 2d 1 (1959).

23. This opinion also noted that the Pennsylvania Supreme Court had taken a similar position and refused to change its rule after the *Benanti* case was decided (*Commonwealth* v. *Voci*, 393 Pa. 404, 143 A. 2d 652). Subsequent to the Voci trial before the Benanti decision the Pennsylvania Legislature changed the rule of that state by statute (15 P. S. sec. 2443).
The new Pennsylvania statute (1957) completely outlaws wiretapping by any public officer as well as any private person, and provides for civil damages as well as one year's imprisonment. It prohibits any divulgence and makes any wiretap evidence inadmissible. This expresses a view at variance with New York and Massachusetts.

24. The case of the lawyer, John G. Broady, is the most sensational wiretapping case of all time. In February, 1955, it was revealed that he had been running a large-scale wiretapping business from an apartment in mid-town Manhattan. With the connivance of telephone company employees, he could spy at will on his victims, including E. R. Squibb, Inc., Bristol-Myers, the Knoedler Art Galleries, and the chairman of the board of Pepsi Cola. Broady was convicted on sixteen counts, and sentenced to serve two to four years. After a few weeks in Sing Sing, he was released on a certificate of reasonable doubt, because of certain improper remarks made by his prosecutor in summation. His conviction was eventually affirmed, by a five-to-two decision, discussed in the present article. The two votes for reversal of the conviction were based on the prosecutor's remarks, not on the plea concerning federal law. As to the latter, he was given leave to appeal, and was continued in bail. After the Supreme Court denied his appeal, the date of Broady's return to Sing Sing was delayed until after Christmas to permit him to testify in other litigation.

Stanley H. Fuld expressly reserved judgment, in the light of the *Benanti* case, as to whether Congress had not fully occupied the field of communications. We shall refer to this later, but first let us summarize the points made by Judge Froessel in the Court's opinion.

Broady was convicted under the old Section 1423, Subdivision 6, of the Penal Law, prior to the enactment of our new eavesdropping law in 1957. The Court of Appeals undertook to determine whether this prohibition, "intended to prevent invasions of privacy", was pre-empted by Section 605 of the Federal Communications Act of 1934, which (the *Benanti* opinion emphasized) was "a comprehensive scheme for the regulation of interstate communications". It noted that the "New York statutory scheme (as of 1955) is far more comprehensive than Section 605" in that it renders criminal the possession of wiretapping instruments with unlawful intent and also "punishes the use of rooms and apparatus for illegal wiretapping itself".

In considering whether the New York act "impinges on federal jurisdiction," the Court noted it had been long established that the same act might constitute an offense against both the state and federal governments. As to this, it cited *United States* v. *Marigold*, 9 How. 560, 569, and seven more recent cases. In the *Nelson* case itself, the Supreme Court had noted that this decision did not "prevent the State from prosecuting where the same act constitutes both a federal offense and a state offense under the police power" when the state statute did not impinge on federal jurisdiction.

> The question has a dual aspect in the instant case, [the *Froessel* opinion continued] namely, whether our penal provision against wire tapping impinges either on Federal *constitutional* jurisdiction under the commerce clause, or on Federal *criminal* jurisdiction under section 605. As to the former, we do not look under subdivision 6 of section 1423 as an attempted regulation of telephonic communications, but simply as "a local police measure" designed to protect the people of this State against unwarranted intrusions into their privacy.

Returning again to the *Nelson* case on this point, Judge Froessel noted that in that case the Supreme Court itself had quoted approvingly from *Gilbert* v. *Minnesota*, 254 U.S. 325, that

> to do so is not to usurp a National power, it is only to render a service to its people . . .
>
> As to the possibility of encroachment on Federal criminal jurisdiction, [Judge Froessel continued] the problem arises here because the nature of the offense made punishable by section 605 of the Federal Act is not clear.[25] While subdivision 6 of section 1423 of our Penal Law clearly makes criminal the *act* of wiretapping, section 605 seems to require both an interception *and* a divulgence or publication . . . Section 605, on its face, does not appear to prohibit wiretapping as such, but seems to make it criminal only when the tapper divulges or publishes the existence of the tap or the information obtained.

He noted that in the *Benanti* case (355 U.S. at page 100, footnote 5) the Supreme Court has expressly left this issue open: "Because both an interception *and* a divulgence are present in this case we need not decide whether both elements are necessary for a violation of section 605".

Under the old canon that a penal statute must be strictly construed, Judge Froessel argued that both must be required, for, if interception alone is a crime, then mere divulgence of the existence of a wiretap must be a crime.

"It is difficult to believe," he said, "that in enacting section 605 Congress meant to punish one who, having no part in the actual wire tapping itself, merely made it known that there had, in fact, been a tap."

Having thus, for more than four lengthy typewritten pages, argued away the contention that the New York statute impinges on federal jurisdiction, Judge Froessel then assumed, for the purpose of argument, that it did so impinge, and proceeded to argue for three more pages that even so it did not come within the *Nelson* decision. It is worthy of note that the Court of Appeals felt it necessary to go on to such length in the elucidation of the *Nelson* case, to which the Supreme Court added little by its blunt refusal to hear the Broady appeal.

In the absence of a specific statement by Congress that it had occupied a field in which the states were otherwise free to legislate, the *Nelson* case set up three criteria for determining that a state statute had been superseded.

The first criterion was whether "the

25. See Footnote 17 of the present article. The condemnation implicit in the words "not clear" was eloquently expressed in June, 1959, by Mr. Justice Black of the Supreme Court. Dissenting in *Barenblatt* v. *U. S.*, 360 U. S. 109, with the concurrence of Chief Justice Warren and Justice Douglas, Justice Black wrote:

> It goes without saying that a law to be valid must be clear enough to make its commands understandable. For obvious reasons, the standard of certainty required in criminal statutes is more exacting than in noncriminal statutes. This is simply because it would be unthinkable to convict a man for violating a law he could not understand. . .

scheme of federal regulation" is so pervasive that it leaves "no room for the States to supplement it". Judge Froessel did not think the Supreme Court, in denouncing state permission for wiretapping in the *Benanti* case, "means to imply that section 605 was so pervasive as to preclude a state penal statute punishing wiretapping". Neither did "the single clause of section 605" compare with the broad sweep of federal anti-subversive law, as to occupancy of the entire field.

The second criterion was whether the federal statutes touch a sphere, like sedition, in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject. Judge Froessel said as to this:

> While it is true that, broadly speaking, interstate telephonic communications fall under the Federal aegis, and that section 605, in order to be effective, applies equally to intrastate communications, this hardly imports that a State is powerless to protect the privacy of its own citizens by forbidding the tapping of telephones within the State.

The third criterion was whether enforcement of the state statute "presents a serious danger of conflict with administration of the federal program". The Court of Appeals found that "the sparsity of prosecutions under section 605 (see annotation in 47 U.S.C.A.) indicates the absence of any 'federal program' to combat wiretapping . . ."

Thus the Court of Appeals disposed of the pre-emption issue in the *Broady* case, plainly showing its concern over the *Nelson* case and the *Benanti* decision. Yet in these three decisions dealing with the *Benanti* case, the major challenge was not met at all. Sometimes in the higher echelons of judicial as well as international affairs, it appears that the major participants move in stately, well-mannered quadrille, avoiding collision at all costs.

But Judge Fuld, dissenting in the *Broady* case, barged head-on into the central question, in what was perhaps a blinding flash of relevance, and what seems to me a polite challenge. I quote him on this in full:

> The Supreme Court declared in the *Benanti* case that the Federal Communications Act is "a comprehensive scheme" for the regulation of both interstate and intrastate communications and, in addition, intimated that Congress, by enacting that statute, "and Section 605 in particular," has exercised its power to forbid wiretapping and prevent a State from authorizing wiretapping even in the exercise of its legitimate police functions. (*Benanti* v. *United States*, 355 U. S. 96, 104.) Such language, particularly when considered in the light of the authorities cited (355 U. S., at page 106) such as *Pennsylvania* v. *Nelson*, (350 U. S. 497) and *Hill* v. *Florida* (325 U. S. 538) gives me pause as to the correctness of the present holding that the Federal Government has not fully occupied the field of telephonic communications, including, of course, their interception. And, if Congress "has taken the particular subject in hand" (*Charleston & Car. R.R.* v. *Varnville Co.*, 237 U. S. 597, 604.) it matters not, contrary to the intimations contained in the court's opinion (pp. 509-512), whether the State legislation is in conflict with the Federal law or supplements it. (See *e.g.*, *Pennsylvania* v. *Nelson*, 350 U. S. 497, 504, supra; *Southern Ry. Co.* v. *Railroad Comm.*, 236 U. S. 439, 448; *Erie R.R. Co.* v. *New York*, 233 U. S. 671, 683, revg. 198 N. Y. 369.) Nevertheless, until the Supreme Court has spoken more decisively on the subject, I hesitate to say that Congress has, through section 605, preempted the field so as to supersede and render ineffectual the provisions of this State's Constitution and Code of Criminal Procedure which authorize wiretapping. (N. Y. Const. art I, sec. 12; Code Drim. Pro., sec. 813-a.)

So spoke Judge Fuld. No one can say that he was looking the other way when the locomotive was coming down the track, right at us. As it developed, the Supreme Court put on the brakes.

As for me, I strongly suggest it is up to Congress—not only the Supreme Court—to speak "more decisively". As to that, I commend highly the bill of Senator Keating, S. 1292, which adapts New York's scheme of eavesdropping law to the federal jurisdiction. But the more important thing is for the Congress to speak for itself.

For a quarter century the Congress has abdicated its powers and made the Supreme Court take over its legislative duties in this area. Congress never even mentioned "wiretapping" when it passed the vast Act of 1934. Yet a brief, obscure, and undebated clause in that Act—truly a needle in a legislative haystack—has become the sole basis for a vast superstructure of law and ethical views as declared in Supreme Court opinions, each erected firmly on its own previous opinions, by the rule of *stare decisis*. Doubtless the learned Justices felt they were on the side of the angels when they declared on this basis many years ago that law enforcement wiretapping was unethical and destructive of personal liberty. Doubtless the Court today has equally intense ethical purpose. But how many angels does the Congress expect to stand on the point of a needle?

If Congress really intended to legislate on the complex subject of wiretapping in the 1934 Act, it did so in an inadequate, slipshod, half-baked way. I do not believe for a minute that Congress has or ever has had any intent to strike down the police power of our fifty states. This would break down our entire structure of criminal law.

If such should be the intent of the Congress, it should say so in its own words, not merely by "declining" to act. And these words should be clear beyond quibble—clear not only to the judges of our state courts, but also to all the people, including the professional criminals and spies who would be the primary beneficiaries.

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